







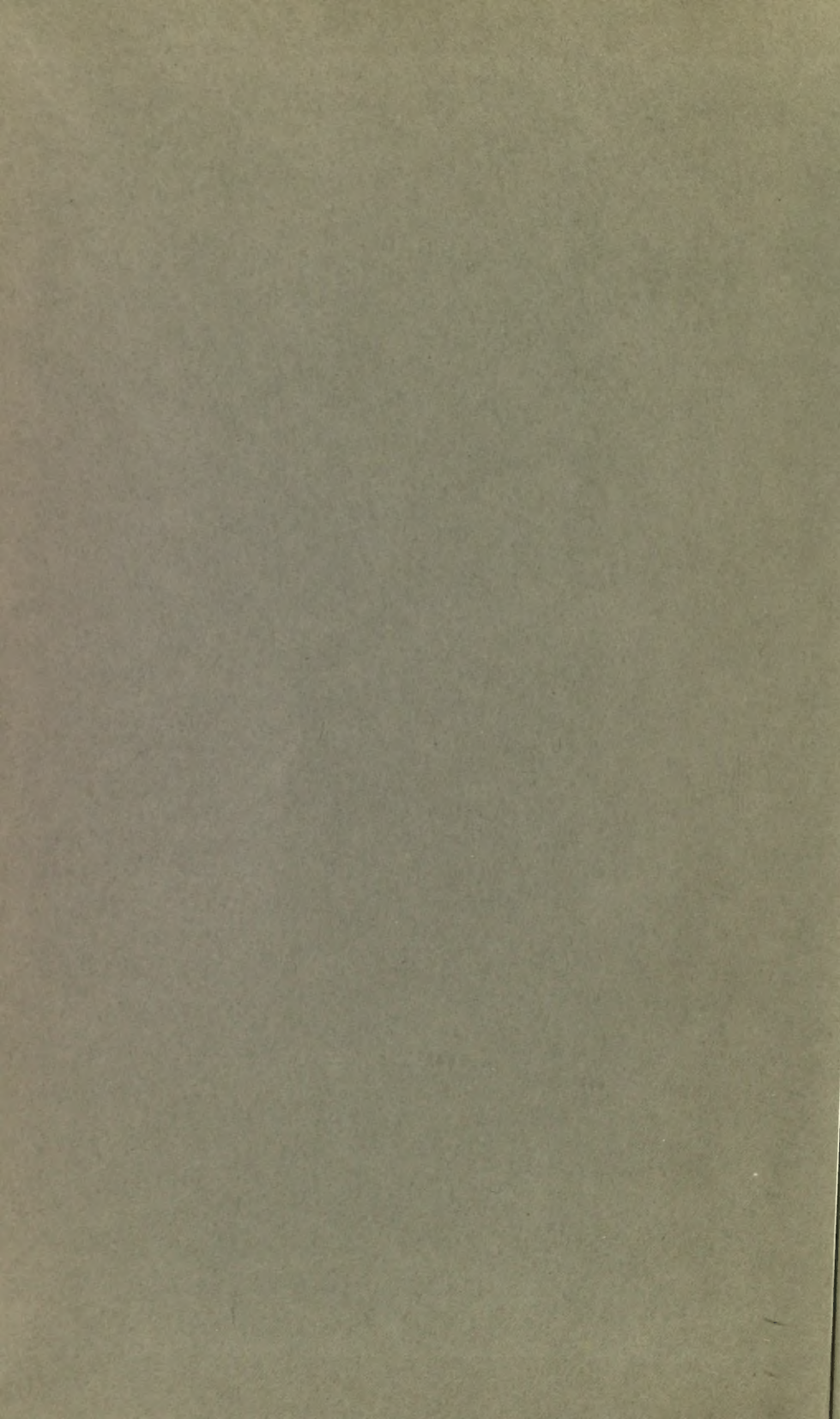
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THE LAW

OF

EXPERT TESTIMONY.

BY

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SECOND EDITION. REWRITTEN AND ENLARGED.

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ST. LOUIS, MO.:

CENTRAL LAW JOURNAL COMPANY,

LAW PUBLISHERS AND PUBLISHERS OF THE  
CENTRAL LAW JOURNAL.

1891.



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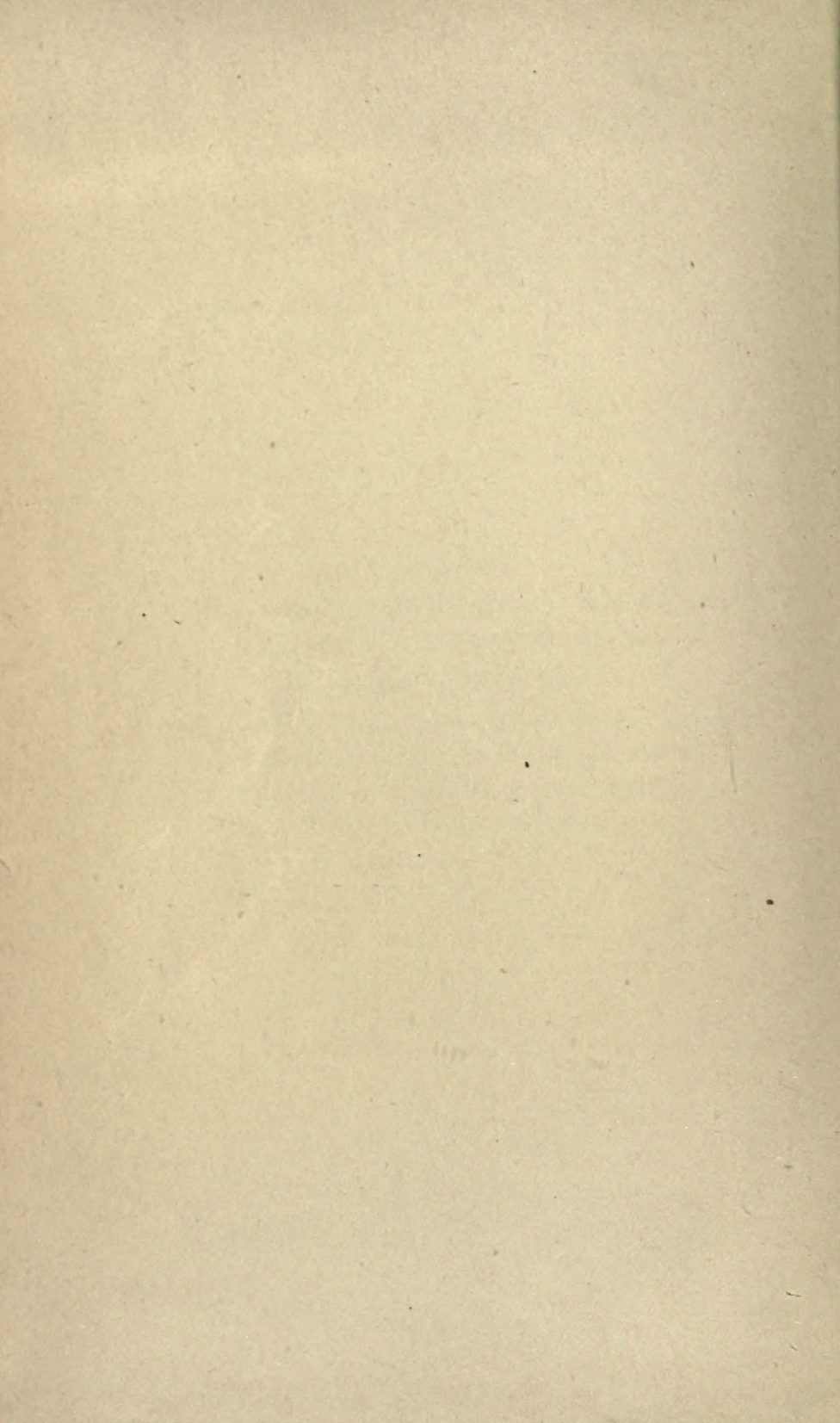
*Chairman of the Interstate Commerce Commission,*

THIS BOOK IS INSCRIBED,  
IN APPRECIATION OF HIS FRIENDSHIP AND THE VIRTUES  
OF HIS PRIVATE LIFE, AS WELL AS IN RECOG-  
NITION OF HIS EMINENCE AS A JURIST  
AND HIS FAME AS A JUDGE.

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## PREFACE TO THE SECOND EDITION.

In the Preface to the first edition of this work, the author stated its purpose to be to furnish to the practitioner a more extended presentation of the law relating to the testimony of experts than the treatises on evidence afforded. It seemed to him desirable that the law on this important subject should be set forth more in detail than it had been found practicable to do in the general treatises on the law of evidence. Writers on the general subject had made no adequate attempt to bring together the numerous cases relating to the testimony of experts, and as the subject was one of great and growing importance, it was deemed wise that a work on expert testimony should be prepared to supply what seemed to be an evident want.

The first edition of the work having been for some time exhausted, and a second edition having become necessary, the author has entirely rewritten the work. This has made necessary changes in the arrangement of the work, and the numbering of the sections will be found somewhat different from those in the former edition. So great changes in



arrangement have been made that no reference is given to the sections of the first edition. It is believed that no great inconvenience will result from this, as the order of the chapters remains the same, and the statement of the sections at the beginning of each chapter will readily indicate where the particular subjects discussed are to be found.

The author believes that the second edition will be found considerably more valuable than the first. He has added an additional chapter—on the Weight of Expert Testimony—which he hopes may be found to be helpful. A large number of additional cases have been added, many of which are of no little importance.

While the author entitles his work *The Law of Expert Testimony*, the reader will find that the treatment of the subject necessitates a statement of the rules of law governing Opinion Evidence generally. The law relating to the admission of the opinions of non-expert witnesses is stated with all the fullness which seemed to be desirable.

HENRY WADE ROGERS.

{ Northwestern University,     /  
{ Evanston, Ill., November, 1890. }

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- Woodbridge v. Austin, 2 Tyler (Vt.), 364, p. 205.
- Woodbury v. Obear, 7 Gray, 467, pp. 64, 75.
- Woodcock v. Houldsworth, 16 M. & W. 124, p. 280.
- Woodcock v. Johnson, 36 Minn. 217, pp. 158, 165.
- Wooden v. People, 1 Parker Cr. Oas. 464, p. 153.
- Woodman v. Dana, 52 Me. 9, pp. 39, 286, 320, 329, 332.
- Woodrow v. O'Conner, 28 Vt. 776, p. 199.
- Woodruff v. Imperial Fire Ins. Co., 83 N. Y. 133, p. 363.
- Woodward v. Bugsbee, 4 N. Y. Sup. Ct. 393, p. 386.

Woodward v. Spiller, 1 Dana, 180, p. 328.  
 Woodward v. The State, 4 Baxter (Tenn.), 322, p. 10.  
 Woolner v. Spaulding, 65 Miss. 204, pp. 66, 67.  
 Worden v. Humeston, etc. R. R. Co., 76 Iowa, 310, p. 392.  
 Worth v. McConnell, 42 Mich. 475, pp. 311, 320, 328.  
 Wright v. City of Fort Howard, 60 Wis. 119, p. 189.  
 Wright v. Hardy, 22 Wis. 348, pp. 70, 149.  
 Wright v. Hessey, 3 Baxter, 42, p. 329.  
 Wright v. People, 112 Ill. 540, p. 437.  
 Wright v. Williams' Estate, 47 Vt. 222, pp. 44, 54, 55, 460.  
 Wyman v. Gould, 47 Me. 159, p. 156.  
 Wyman v. Lexington, etc. R. R. Co., 13 Met. (Mass.) 216, p. 353.  
 Wynne v. State, 56 Ga. 113, p. 282.  
 Wynne v. Tyrwhitt, 4 B. & Ald. 376, p. 286.

## Y.

Yahn v. City of Ottumwa, 60 Iowa, 429, p. 8.  
 Yates v. Waugh, 1 Jones (N. C.) Law, 483, p. 301.  
 Yates v. Yates, 76 N. C. 142, pp. 53, 289, 298, 322.  
 Yeatman v. Hart, 6 Humph. (Tenn.) 374, p. 116.  
 Yoe v. The People, 49 Ill. 410, pp. 417, 419.  
 York v. The People, 31 Hun (N. Y.), 446, 448, p. 7.  
 Young v. Johnson, 46 Hun (N. Y.), 164, p. 155.  
 Young v. Makepence, 103 Mass. 50, p. 187.  
 Young v. O'Neal, 57 Ala. 566, p. 264.  
 Yost v. Conroy, 92 Ind. 464, pp. 367, 369.

## Z.

Zimmerman v. Hesler, 32 Md. 274, p. 205.  
 Zube v. Weber, 67 Mich. 52, p. 6.  
 Zugasti v. Lamer, 12 Moore P.C. 331, pp. 197, 230, 231.





## CHAPTER I.

### THE ADMISSIBILITY IN EVIDENCE OF THE OPINIONS OF ORDINARY AND EXPERT WITNESSES.

#### SECTION.

1. The Term Expert Defined.
2. The Practice of Admitting Expert Testimony an Ancient One.
3. The Competency of Non-Professional Witnesses to Give Opinion Evidence.
4. The Admissibility in Evidence of the Opinions of Non-Professional Witnesses in Cases of Necessity.
5. The Inadmissibility of Opinion Evidence.
6. When Expert Testimony is Admissible.
7. Meaning of the Terms Science and Art.
8. When the Opinions of Experts are Inadmissible.
9. The Question of the Admissibility of Expert Testimony is for the Court.
10. Cases Illustrative of the Inadmissibility of the Opinions of Experts.
11. The Inadmissibility of Opinions Founded on a Theory of Morals or Duty.
12. The Inadmissibility of Opinions on Abstract Questions of Science, not Related to the Facts in Issue.
13. Inadmissibility of Opinions Based on Speculative Data.
14. Admissibility of the Testimony of Experts Who Have Made *Ex Parte* Investigations.

§ 1. The Term "Expert" Defined.—The phrase "expert testimony" is not applicable to all species of opinion evidence. A witness is not giving "expert testimony" who, without any special personal fitness, or special intelligence, simply testifies as to the impressions produced on his mind or senses by

that which he has seen or heard and which can only be described to others by giving the impression produced upon the witness. Neither is a person giving "expert testimony," strictly speaking, when he is testifying as to matters which require no peculiar intelligence and concerning which any person is qualified to judge according to his opportunities of observation. "Expert testimony" properly begins with testimony concerning those "branches of business or occupations where some intelligence is requisite for judgment" and when "opportunities and habits of observation must be combined with some practical experience."<sup>1</sup> And in the case cited it is said that "the scale rises as the qualifications become nicer, and require greater capacity or knowledge and experience, until it reaches scientific observers, and practitioners in arts and sciences requiring practice and thorough special training."

An expert is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same. Strictly speaking, an "expert" in any science, art, or trade, is one who, by practice or observation has become experienced therein. An expert has been defined as "a person of skill;"<sup>2</sup> as "a skillful or experienced person; a person having skill, experience, or peculiar knowledge on certain subjects, or in certain professions; a scientific witness."<sup>3</sup> "An expert" said Mr. Justice FOLGER, "is one instructed by experience, and to become one, requires a course of previous habit and practice, or of study, so as to be

<sup>1</sup> See *Kelly v. Richardson*, 69 Mich. 430.

<sup>2</sup> *Rochester v. Chester*, 3 N. H. 349, 365.

<sup>3</sup> *Heald v. Thing*, 45 Me. 392, 394.

familiar with the subject.”<sup>1</sup> “All persons, I think,” said Mr. Justice MAULE, “who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts so far as expertness is required.”<sup>2</sup> And this language has been adopted by the court in Virginia.<sup>3</sup> In New Hampshire, we find Mr. Justice DOE declaring: “An expert must have made the subject upon which he gives his opinion a matter of particular study, practice or observation, and he must have particular special knowledge on the subject.”<sup>4</sup> While Mr. Chief Justice AMES, of Rhode Island, says: “Knowledge of any kind, gained for and in the course of one’s business as pertaining thereto, is precisely that which entitles one to be considered an expert, so as to render his opinion, founded on such knowledge, admissible in evidence.”<sup>5</sup> “An expert,” says the court in Vermont, through Mr. Justice ROYCE, “is defined to be a person that possesses peculiar skill and knowledge upon the subject-matter that he is required to give an opinion upon.”<sup>6</sup> As defined by Mr. Chief Justice SHAW in Massachusetts, an “expert is a person of large experience in any particular department of art, business or science.”<sup>7</sup> As stated by Mr. Justice REDFIELD in his edition of Greenleaf’s Evidence, “The term ‘expert’ seems to imply both superior knowledge and practical experience in the art or profession;

<sup>1</sup> *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453, 460.

<sup>2</sup> *Vander Donckt v. Thellusson*, 8 Man. G. & S. (65 Eng. C. L.) 812.

<sup>3</sup> *Bird v. Commonwealth*, 21 Gratt. 800.

<sup>4</sup> *Jones v. Tucker*, 41 N. H. 546.

<sup>5</sup> *Buffum v. Harris*, 5 R. I. 250.

<sup>6</sup> *State v. Phair*, 48 Vt. 636, 377.

<sup>7</sup> *Dickenson v. Fitchburg*, 13 Gray, 546, 555.



but generally, nothing more is required to entitle one to give testimony as an expert, than that he has been educated in the particular art or profession."<sup>1</sup> For persons are presumed to understand questions pertaining to their own profession or business.<sup>2</sup> As the opinions of experts may rest either on their personal knowledge, or on facts testified of by other witnesses,<sup>3</sup> it is error to assume, as is done in one case,<sup>4</sup> that an expert is one who simply testifies from premises furnished by the testimony of other witnesses. One court says that no individual can be considered an expert who does not thoroughly understand the sciences involved.<sup>5</sup>

§ 2. **The Practice of Admitting Expert Testimony an Ancient One.**—The practice of admitting the evidence of witnesses, who have become qualified by study and experience to express opinions upon questions of science and art, is by no means peculiar to modern times. By the Roman law, persons who were *artis periti* could be summoned by the *judex* at his discretion, in order to inform himself as to physical laws or phenomena.<sup>6</sup> And the celebrated criminal code framed by the Emperor Charles the Fifth, at Ratisbon in 1532, contained a formal enactment requiring the opinion of medical experts to be taken in all cases where death was supposed

<sup>1</sup> 1 Greenl. Evid., § 440.

<sup>2</sup> Jones v. White, 11 Humph. 268. And see State v. Clark, 15 S. C. (N. S.) 403, 408.

<sup>3</sup> Snow v. Boston, etc. R. R. Co., 65 Me. 230, 232; Lessee of Forbes v. Caruthers, 3 Yeates, 527; Polk v. State, 36 Ark. 117, 124, 125.

<sup>4</sup> Travis v. Brown, 43 Pa. St. 9, 13, 14.

<sup>5</sup> Allen v. Hunter, 6 McLean, 303, 310.

<sup>6</sup> L. 8. § 1, x. 1; L. 3, § 4, xi. 6; L. 3, Cod. fin. reg., iii. 39. Endeman, 243.

to have been occasioned by violent means.' In 1606, Henry the Fourth, of France, in giving letters patent to his first physician, conferred on him the power of appointing two surgeons in every city or important town, whose duty it should exclusively be to examine all wounded or murdered men, and report thereon.<sup>2</sup> While in England one of the early records shows,<sup>3</sup> that on an appeal of mayhem, the defendant prayed the court to see the wound for the purpose of determining whether there had been a maiming or not, but the court did not know how to decide, as the wound was new; and thereupon the defendant took issue, and prayed the court that the mayhem might be examined. A writ was accordingly sent to the sheriff to cause to come, *medicos chirurgicos de melioribus, London, ad informandum dominum regem et curiam de his, qua lis ex parte domini regis injungerentur*. And, in 1553, Mr. Justice SAUNDERS is reported as saying: "If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honourable and commendable thing in our law, for thereby it appears that we don't despise all other sciences but our own, but we approve of them, and encourage them as things worthy of commendation."<sup>4</sup> Instances are recorded in the Year Books, where the courts received the opinions of witnesses learned in the sciences and arts.<sup>5</sup>

<sup>1</sup> See 2 Beck's Med. Juris. 896.

<sup>2</sup> Fodere, Introduction, Vol. 1, p. 32.

<sup>3</sup> 28 Ass. pl. 5.

<sup>4</sup> Buckley v. Rice, 1 Plowden, 125.

<sup>5</sup> 9 H. 7 16; 7 H. 6, 11.

§ 3. **The Competency of Non-Professional Witnesses to Give Opinion Evidence.**—The rule admitting the testimony of experts is exceptional,<sup>1</sup> for no principle of the law is better settled than that the opinions of witnesses are, in general, inadmissible in evidence.<sup>2</sup> They must state *facts* and not opinions deduced from the facts; for it is the peculiar province of the jury to determine upon the inferences which are to be drawn from the facts. But to this general rule there are well recognized exceptions. Experience has demonstrated the difficulty which exists in certain cases, of stating the facts in detail to the jury in such a manner, that they shall produce the same impression upon the minds of the jurymen that they have legitimately produced upon the minds of the

<sup>1</sup> Ellingwood v. Bragg, 52 N. H. 488; Polk v. State, 36 Ark. 117, 125.

<sup>2</sup> Continental Ins. Co. v. Delpenche, 82 Pa. St. 225; Frost v. Blanchard, 97 Mass. 155; Hames v. Brownlee, 63 Ala. 277; Fitzgerald v. Hayward, 50 Mo. 516; Holden v. Robinson Co., 65 Me. 216; Thomas v. State, 40 Tex. 36; Lawrence v. Hudson, 59 Tenn. 671; Benedict v. City of Fon du Lac, 44 Wis. 495; Cummins v. State, 58 Ala. 387; Lewis v. Brown, 41 Me. 448; Scaggs v. Baltimore, etc. R. R. Co., 10 Md. 268; Higgins v. Carlton, 28 Md. 115; Hayes v. Wells, 34 Md. 513; Babcock v. Middlesex Savings Bank, 28 Conn. 306; McKnight v. State, 6 Tex. Ct. of App. 162; Seibles v. Blackwell, 1 McM. (S. C.) 57; Dawson v. Callaway, 18 Ga. 573; Hawkins v. State, 25 Ga. 207; Central Railroad, etc. v. Kelly, 58 Ga. 107; Rochester v. Chester, 3 N. H. 364; Patterson v. Colebrook, 9 Foster (N. H.), 94; Daniels v. Mosher, 2 Mich. 183; Griffin v. Town of Willow, 43 Wis. 509; Wood v. Chicago, etc. R. R. Co., 40 Wis. 582; Montgomery v. Town of Scott, 34 Wis. 338; Holliman v. Cabanne, 43 Mo. 568; Bailey v. Pool, 13 Ired. (N. C.) 406; New Albany, etc. R. R. Co. v. Huff, 19 Ind. 315; Robinson v. Fitchburg, etc. R. R. Co., 7 Gray (Mass.), 92; Forbes v. Caruthers, 3 Yeates, 527; Merritt v. Seaman, 6 N. Y. 168; Berckman v. Berckman, 16 N. J. Eq. 122; Corlis v. Little, 13 N. J. Law, 232; Massachusetts Life Ins. Co. v. Eshelman, 30 Ohio St. 647; Turner v. Cook, 36 Ind. 129; Shepard v. Pratt, 16 Kan. 209; Koons v. St. Louis & Iron Mountain R. R. Co., 65 Mo. 592; Mascheck v. St. Louis R. R. Co., 1 Mo. App. 600; Gassenheimer v. State, 52 Ala. 314; McAdory v. State, 59 Ala. 92; Houston, etc. R. R. Co. v. Smith, 52 Tex. 178; Jasper Co. v. Osborne, 59 Iowa, 208; Zube v. Weber, 67 Mich. 52.



witnesses. So that from the very necessities of the case, it is sometimes found essential that the opinions of ordinary witnesses should be received, as otherwise it would be impossible to arrive at any accurate conclusion as to the facts involved.

The dividing line between what is a fact and what is an opinion cannot be very clearly defined, and while the general rule only allows an ordinary witness to testify to facts and not to express opinions, yet it is not to be overlooked that that which is necessarily but an opinion may be a fact concerning which an ordinary witness can testify. Thus it has been held that the question whether a team can be turned in a road, or a certain thing pass through a door or other opening, while necessarily but an opinion, is also a fact as to which an ordinary witness can testify.<sup>1</sup> So a witness is allowed to testify as a fact to the financial standing of another,<sup>2</sup> while the opinion of the witness as to such person's financial standing has been held inadmissible.<sup>3</sup>

When it is sought to introduce in evidence the opinions of non-professional witnesses, it becomes necessary for the court to determine certain preliminary questions before such testimony can be given.

1. The court must decide whether the subject-matter to which the testimony relates is of such a nature as to warrant the introduction of opinion evidence from non-professional witnesses. In deciding that question the court will be governed by the following principles:

(a.) It is competent for a witness to state his

<sup>1</sup> *Funston v. Chicago, etc. R. R. Co.*, 61 Iowa, 452 (1883).

<sup>2</sup> *Thompson v. Hall*, 45 Barb. (N. Y.) 216.

<sup>3</sup> *York v. The People*, 31 Hun (N. Y.) 446, 448.

opinion in evidence when the primary facts on which it is founded are of such a nature that they cannot be adequately reproduced or described to the jury, so as to enable another than the actual observer to form an intelligent conclusion from them.<sup>1</sup>

(b.) And when the facts upon which the witness is to express his opinion are of such a nature that men in general are capable of comprehending and understanding them.<sup>2</sup> If they are not of that nature the opinions of ordinary witnesses could not be received, but the opinions would have to come from men of science or skill.

2. It having been determined by the court that the subject-matter to which the testimony relates warrants the admission of opinion evidence from ordinary witnesses, the court must then determine whether the witness in question is competent to express an opinion. The qualifications of the witness to express an opinion should be made to appear to the satisfaction of the court. The witness must first state the facts and his means of observation, and the court may then decide whether the facts testified to and his means of observation are such as to justify the expression of an opinion.<sup>3</sup>

A witness, who is not an expert, is not allowed to express an opinion unless he has a personal knowledge of the facts on which the opinion is based. He cannot express an opinion on facts testified to by

<sup>1</sup> *Yahn v. City of Ottumwa*, 60 Iowa, 429; *The Atchison, etc. R. R. Co. v. Miller*, 39 Kan. 419, 421; *State v. Baldwin*, 36 Kan. 2; *Railroad Co. v. Schultz*, 43 Ohio St. 270, 282; *City of Parsons v. Lindsay*, 26 Kan. 426; *Cavendish v. Troy*, 41 Vermont, 108; *State v. Folwell*, 14 Kan. 105; *Bates v. Sharon*, 45 Vermont, 474.

<sup>2</sup> See *Commonwealth v. Sturtivant*, 117 Mass. 122, 137.

<sup>3</sup> *First National Bank v. Wirebach*, 106 Pa. St. 37, 44; *People v. Levy*, 71 Cal. 618.

other witnesses, nor in answer to a hypothetical case.<sup>1</sup> As his opinion is based on facts within his personal knowledge, he is, as a rule, required to state the facts as fully as he may be able, and having done so, he is then allowed to state his opinion based on the facts so testified to.<sup>2</sup> But in some cases it is impossible in the nature of things to describe the facts, and the opinion of the witness will not be excluded in such case because of his inability to give a description of the facts. For instance, in questions relating to identity of persons, the identification may be by the mere expression of the countenance, which cannot be described. And the witness may be correct although unable to describe a single feature, or to give the color of the hair, or of the eyes, or the particulars of the dress.<sup>3</sup>

§ 4. **The Admissibility in Evidence of the Opinions of Non-Professional Witnesses in Cases of Necessity.**—We have stated in the preceding section that ordinary witnesses are allowed to express opinions based on facts within their personal observation when the facts cannot be so described as to enable another to draw any intelligent conclusion therefrom. Opinions in such cases must be received in evidence from the necessities of the situation. The cases are

<sup>1</sup> *Winter v. City Council*, 79 Ala. 481; *Bell v. McMaster*, 29 Hun (N. Y.) 272; *Pittard v. Foster*, 12 Ill. App. 132; *Appleby v. Broek*, 76 Mo. 314; *Eyerman v. Sheehan*, 52 Mo. 221; *Sydleman v. Beckwith*, 43 Conn. 9.

<sup>2</sup> *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; *Jones v. Fuller*, 19 S. C. (N. S.) 66; *Railroad Co. v. Schultz*, 43 Ohio St. 270, 282; *Shaver v. McCarthy*, 110 Pa. St. 339; *Goodwin v. State*, 96 Ind. 500; *American Bible Society v. Price*, 115 Ill. 623; *Pinney's Will*, 27 Minn. 280; *State v. Erb*, 74 Mo. 199.

See *Sydleman v. Beckwith*, 43 Conn. 9, 13.



not a few in which the opinions of ordinary witnesses are admissible.

1. An ordinary witness may express an opinion concerning the age of a person whom he has seen.<sup>1</sup>

2. And the identity of a person or thing which he has observed.<sup>2</sup>

3. Concerning the appearance of a person. As to whether he appeared to be sober or intoxicated when the witness saw him,<sup>3</sup> and this without showing that the witness had any previous knowledge of the habits and conduct of such person.<sup>4</sup> As to whether a person appeared angry or not;<sup>5</sup> or sad;<sup>6</sup> or nervous, and showed fear or manifested grief;<sup>7</sup> or

<sup>1</sup> *Commonwealth v. O'Brien*, 134 Mass. 198; *Foltz v. The State*, 33 Ind. 215; *Morse v. The State*, 6 Conn. 9; *DeWitt v. Bailey*, 17 N. Y. 344; *Benson v. McFaddon*, 50 Ind. 431; *Kansas Pacific R. R. Co. v. Miller*, 2 Colo. 442; *Marshall v. State*, 49 Ala. 21.

<sup>2</sup> *Walker v. The State*, 58 Ala. 393; *Wiggins v. Henson*, 68 Ga. 819; *State v. Babb*, 76 Mo. 501; *King v. N. Y. Cent. R. R. Co.*, 72 N. Y. 607; *Woodward v. The State*, 4 Baxter (Tenn.), 322; *Turner v. McFee*, 61 Ala. 468; *Beverly v. Williams*, 4 Dev. & Bat. (N. C.) 236; *Commonwealth v. Sturtivant*, 117 Mass. 133; and in *Commonwealth v. Williams*, 105 Mass. 62, where there was identification of a burglar by his voice. In *Beale v. Posey*, 72 Ala. 323, that witness knew and recognized the walk of another. And so witnesses can express an opinion that certain foot-prints correspond with certain boots. *Commonwealth v. Pope*, 103 Mass. 440; *State v. Morris*, 84 N. C. 756. And that certain tracks were made by a certain person. *State v. Reitz*, 83 N. C. 634. In the case just cited, the court remarks: "The bare opinion of a witness as to the identity of the tracks should have no weight with a jury; but when the witness gives his reasons for entertaining the opinion, the whole of the testimony should be allowed to go to the jury, for them to say whether the grounds of the opinion are reasonable and satisfactory." So, too, a witness has been allowed to testify that certain tracks were made by a certain wagon. *State v. Folwell*, 14 Kan. 105.

<sup>3</sup> *People v. Monteith*, 73 Cal. 7; *State v. Huxford*, 47 Iowa, 16; *People v. Eastwood*, 14 N. Y. 562; *Stacy v. Portland Publishing Co.*, 68 Me. 279; *City of Aurora v. Hillman*, 90 Ill. 66.

<sup>4</sup> *Castner v. Sliker*, 33 N. J. L. 95; s. c., *Ibid.* 507.

<sup>5</sup> *Jenkins v. The State*, 82 Ala. 25; *State v. Shelton*, 64 Iowa, 333.

<sup>6</sup> *Culver v. Dwight*, 6 Gray (Mass.), 444; *Tobin v. Shaw*, 45 Me. 331.

<sup>7</sup> *State v. Baldwin*, 36 Kan. 1. And see *Brownell v. People*, 38 Mich. 732.

seemed excited;<sup>1</sup> or appeared to be suffering pain;<sup>2</sup> or appeared attached to another.<sup>3</sup>

4. Concerning the health, the physical and mental condition of another.<sup>4</sup> For instance, that a person was sick;<sup>5</sup> or in poor health;<sup>6</sup> or was formerly in good health;<sup>7</sup> or grew worse in health;<sup>8</sup> or was rational or irrational;<sup>9</sup> sane or insane;<sup>10</sup> or whether a person's mind was clear;<sup>11</sup> or had failed mentally in a given time;<sup>12</sup> whether a person appeared to be well or ill;<sup>13</sup> or "looked bad."<sup>14</sup>

5. Concerning a person's habits. For instance, that a person was of intemperate habits.<sup>15</sup>

6. Concerning his actions. For example, that a person acted strangely and in a childish manner,<sup>16</sup> or was "short" in answering questions.<sup>17</sup>

7. Concerning his character. For example, that he was eccentric,<sup>18</sup> or of fickle mind.<sup>19</sup>

<sup>1</sup> *State v. Houston*, 78 Ala. 576.

<sup>2</sup> *South, etc. R. R. Co. v. McLendon*, 63 Ala. 266.

<sup>3</sup> *Trelawney v. Coleman*, 2 Starkie, 168; *McKee v. Nelson*, 4 Cowen (N. Y.), 355; *Pelamourges v. Clark*, 9 Iowa, 1, 17. And see *Evans v. The People*, 12 Mich. 27, 35; *Blake v. The People*, 73 N. Y. 586.

<sup>4</sup> *Tierney v. Minnesota, etc. R. R. Co.*, 33 Minn. 311; *Albert v. The State*, 66 Md. 325; *Bridge v. City of Oshkosh*, 71 Wis. 363.

<sup>5</sup> *Chicago, etc. R. R. Co. v. George*, 19 Ill. 510, 515.

<sup>6</sup> *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138.

<sup>7</sup> *Smalley v. Appleton*, 70 Wis. 340.

<sup>8</sup> *Louisville, etc. R. R. Co. v. Wood*, 113 Ind. 544.

<sup>9</sup> *People v. Lavelle*, 71 Cal. 351.

<sup>10</sup> *Haney v. Clark*, 65 Texas, 93; *Upstone v. The People*, 109 Ill. 169; *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612; *McRae v. Malloy*, 93 N. C. 154.

<sup>11</sup> *People v. Sanford*, 43 Cal. 32.

<sup>12</sup> *Commonwealth v. Brayman*, 136 Mass. 438.

<sup>13</sup> *Canady v. Lynch*, 27 Minn. 435; *Wilkenson v. Moseby*, 30 Ala. 562.

<sup>14</sup> *South, etc. R. R. Co. v. McLendon*, 63 Ala. 275.

<sup>15</sup> *Gallagher v. The People*, 120 Ill. 179, 182; *Smith v. State*, 55 Ala. 1.

<sup>16</sup> *Parsons v. Parsons*, 66 Iowa, 754; *Irish v. Smith*, 8 S. & R. 573.

<sup>17</sup> *Carroll v. State*, 23 Ala. 28.

<sup>18</sup> *Fraser v. Jennison*, 42 Mich. 206, 215.

<sup>19</sup> *Mills v. Winter*, 94 Ind. 329.

8. Concerning his reputation. Whether it was good or bad.<sup>1</sup>

So the opinions of ordinary witnesses are received.

1. In matters of size, color, weight and quantity.<sup>2</sup>

2. In estimations of time and distance.<sup>3</sup>

3. In regard to the character of sounds, and the direction from which they seem to come.<sup>4</sup>

4. Whether a thing was done in a jocular or in an insulting manner.<sup>5</sup>

5. How a certain thing which the witness observed appeared.<sup>6</sup>

6. On questions of value.<sup>7</sup>

7. As to impressions of cold or heat, light and darkness.<sup>8</sup>

8. As to the disposition of animals.<sup>9</sup>

9. And in some cases as to the capacity and sufficiency of an object for the purpose intended. Thus, ordinary persons having sufficient opportunity for personal observation, and giving in their testimony the facts of their observation, have been allowed to express their opinions as to the capacity and sufficiency

<sup>1</sup> *Childs v. State*, 55 Ala. 28; *Snow v. Grace*, 29 Ark. 138.

<sup>2</sup> *Commonwealth v. Sturtivant*, 117 Mass. 133; *Bass Furnace Co. v. Glasscock*, 82 Ala. 452.

<sup>3</sup> See *Commonwealth v. Sturtivant*, 117 Mass. 133.

<sup>4</sup> *State v. Shinborn*, 46 N. H. 501. In *Atchison, etc. R. R. Co. v. Miller*, 39 Kan. 419, a person was permitted to testify that he was in a position to have heard a whistle, if it had been sounded. In *Dyer v. Dyer*, 87 Ind. 13, it was held a witness could not express his opinion as to whether a person heard certain words.

<sup>5</sup> *Powers v. The State*, 23 Texas App. 42. And see *Ray v. State*, 50 Ala. 104; *Raisler v. Springer*, 38 Ala. 703.

<sup>6</sup> *The State v. Parker*, 96 Mo. 382, 393. In *Commonwealth v. Sturtivant*, 117 Mass. 122, where a witness was permitted to express an opinion that certain shoes which he had seen appeared as if they had recently been washed.

<sup>7</sup> *Spear v. Drainage Commissioners*, 113 Ill. 632, 635. See chapter VIII.

<sup>8</sup> *Kelley v. Richardson*, 69 Mich. 430, 436.

<sup>9</sup> *Matteson v. State*, 55 Ala. 224; *Whittier v. Franklin*, 46 N. H. 23.



of a culvert to carry away accumulated water in time of freshets.<sup>1</sup> And where the question was as to the strength and sufficiency of a dam to sustain the quantity of water which would be accumulated by it, the opinions of practical and observing men, who possessed no peculiar skill on the subject, but stated the facts of their observation, have been received in evidence.<sup>2</sup> (But see pages 14, 15.)

§ 5. **The Inadmissibility of Opinion Evidence.**—

We have seen that opinions may be received when the facts cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses. It is equally true that opinions cannot be received in cases where the jury are equally capable with the witness of forming an opinion from the facts stated.<sup>3</sup>

1. The opinions of witnesses, whether experts or not, will not, according to some of the authorities, be received on the question whether a certain place is safe or dangerous.<sup>4</sup>

For instance, it has been held that the opinions of witnesses could not be received as to whether a

<sup>1</sup> *McPherson v. St. Louis, etc. R. R. Co.*, 97 Mo. 253, 256.

<sup>2</sup> *Porter v. The Pequonnoc Mfg. Co.*, 17 Conn. 249. In this case it is stated: "They (the witnesses) had acquired, by their personal observation, a knowledge of the character of the stream, and also of the dam, and were therefore peculiarly qualified to determine whether the latter was sufficiently strong to withstand the former. The opinions of such persons, on a question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triers than those of scientific men who were personally unacquainted with the facts in the case." And see *Harford County v. Wise* (Md.), 18 Atl. Rep. 31.

<sup>3</sup> *Railroad Co. v. Schultz*, 43 Ohio St. 270; *Kent v. Miltenberger*, 15 Mo. App. 480; *Parkhurst v. Masteller*, 57 Iowa, 476.

<sup>4</sup> See *Couch v. Charlotte, etc. R. R. Co.*, 22 S. C. 557, 561; *Tolson v. Inland Coasting Co.*, 17 D. C. 39; *Way v. Illinois Central R. R. Co.*, 40 Iowa, 341; *King v. Missouri, etc. R. Co. (Mo.)*, 11 S. W. Rep. 563; *Topeka v. Sherwood*, 39 Kan. 690.

stock car was a dangerous place for a person to ride,<sup>1</sup> and that a city surveyor, civil engineer and superintendent of streets could not express an opinion whether a street gutter was in a safe or unsafe condition;<sup>2</sup> and that a witness could not state whether in his opinion a bridge "was reasonably safe;"<sup>3</sup> nor whether a highway was safe;<sup>4</sup> and yet the rule is not one that has been applied in all cases. The elements entering into the question of reasonable safety are sometimes numerous and often difficult of description,<sup>5</sup> and there are cases in which opinions have been received on the subject.<sup>6</sup>

2. The question whether a certain thing is necessary or not, is, ordinarily, a question for the jury to determine. It has therefore been held incompetent to introduce expert testimony to show the opinion of the witness that a cattle-guard or barrier was necessary at a particular point on defendant's line of railroad,<sup>7</sup> and it has been held that opinions will not be received on the question whether a certain

<sup>1</sup> *Lawson v. Chicago, etc. R. R. Co.*, 64 Wis. 447.

<sup>2</sup> *Baker v. City of Madison*, 62 Wis. 143.

<sup>3</sup> *Weeks v. Town of Lyndon*, 54 Vt. 638; *Bliss v. Wilbraham*, 8 Allen (Mass.) 564; *Crane v. Northfield*, 33 Vt. 126.

<sup>4</sup> *Kelley v. Fon Du Lac*, 31 Wis. 179; *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520; *Brown v. Cape Girardeau, etc. Plank Road Co.*, 89 Mo. 152; *City of Topeka v. Sherwood*, 39 Kan. 690.

<sup>5</sup> See *Schwander v. Birge*, 46 Hun (N. Y.) 36, 69.

<sup>6</sup> *Taylor v. Town of Monroe*, 43 Conn. 36; *Albert v. The State*, 66 Md. 325. In *Laughlin v. Street Railway Co.*, 62 Mich. 226, the court say: "It is always competent for those who are familiar with the highways and their use to give their impressions received at the time concerning safety or convenience of passage, and other conditions of an analogous nature. They are not strictly scientific questions, and come within familiar principles." But in the foregoing case, *MORSE, J.*, delivered a strong dissenting opinion. In *Cross v. Lake Shore, etc. Railway Co.*, 69 Mich. 363, a civil engineer was allowed to testify that a hole near a traveled way "was a dangerous place, and needed protection." And see *Merkle v. Bennington*, 68 Mich. 133, 143; also section 10.

<sup>7</sup> *Amstein v. Gardner*, 134 Mass. 10.

fence was sufficient to turn stock,<sup>1</sup> nor whether certain cattle-guards were sufficient and proper.<sup>2</sup>

3. The question of what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine in view of the circumstances of fact attending it.<sup>3</sup> But while opinions as to proximate cause are ordinarily inadmissible, experts are allowed on questions of science to testify as to the possible causes of a given effect,<sup>4</sup> and the opinions of ordinary witnesses are sometimes likewise received as to the cause of a given effect. Thus, where the question was whether a dam was the cause of an overflow, and it was claimed that the question should be settled by actual survey, measurement and science, the court declared that the opinions and observations of the witnesses who were well acquainted with the premises were as certain and direct.<sup>5</sup>

4. Whether this or that act amounts to negligence is ordinarily a matter of judgment and common experience rather than of science or skill, and the opinions of experts are inadmissible in evidence concerning the same.<sup>6</sup> An expert may be asked whether certain things were properly or skillfully done, but not whether a person was guilty of want of ordinary care or of negligence in the doing of such things.<sup>7</sup> The witness cannot be asked whether

<sup>1</sup> *Railroad Co. v. Schultz*, 43 Ohio St. 270; *Sowers v. Dukes*, 8 Minn. 23; *Enright v. The Railroad Co.*, 33 Cal. 230.

<sup>2</sup> *St. Louis, etc. R. R. Co. v. Ritz*, 33 Kan. 404. See page 12.

<sup>3</sup> *Milwaukee, etc. R. R. Co. v. Kellogg*, 94 U. S. 469, 474.

<sup>4</sup> *Moyer v. New York Central R. R. Co.*, 98 N. Y. 646.

<sup>5</sup> *McLeod v. Lee*, 17 Nevada, 103.

<sup>6</sup> *Mantel v. Chicago, etc. R. R. Co.*, 33 Minn. 62, 65; *The East Tennessee, etc. R. R. Co. v. Wright*, 76 Ga. 532, 536; *Ballard v. New York etc. R. R. Co.*, 126 Pa. St. 141; *Bills v. Ottumwa*, 35 Iowa 107.

<sup>7</sup> *Seliger v. Bastian*, 66 Wis. 521, 522.



a person exercised due care;<sup>1</sup> nor whether a person was a careful driver;<sup>2</sup> nor "is that the ordinary, *careful, prudent*, and safe manner (of performing the service);"<sup>3</sup> nor "what would be the chances for a stage coach to tip over, being driven by an *ordinarily careful, prudent* driver;"<sup>4</sup> nor whether the practice of a certain railroad in blowing its whistle was "reasonable or unreasonable," "*prudent*" or "extraordinary," or "an unreasonable manner of proceeding on the part of the engineer;"<sup>5</sup> nor whether leaving a horse unhitched in a mill yard "was the act of a careful and prudent man;"<sup>6</sup> nor whether placing wet staves on the outside of an arch with fire in it "was a safe and prudent way to dry them;"<sup>7</sup> nor whether the plaintiff could have been injured in oiling a certain part of the machinery of a steam engine if he had not been careless;<sup>8</sup> nor whether the means of egress from a building were all that due care required the defendant to provide;<sup>9</sup> nor whether certain goods "were as well handled and cared for as goods usually are when attached."<sup>10</sup> And so it has been held that while a physician might state what, in his opinion, was the cause of a certain hemorrhage, yet it was not competent for him to say whether it was to be attributed to the

<sup>1</sup> Hopkins v. Indianapolis, etc. R. R. Co., 78 Ill. 32.

<sup>2</sup> Morris v. East Haven, 41 Conn. 252.

<sup>3</sup> Seliger v. Bastian, 66 Wis. 521.

<sup>4</sup> Oleson v. Tolford, 37 Wis. 327.

<sup>5</sup> Hill v. Portland, etc. R. R. Co., 55 Me. 439.

<sup>6</sup> Stowe v. Bishop, 58 Vt. 498 (1886). And see Monroe v. Lattin, 25 Kan. 351.

<sup>7</sup> White v. Ballou, 8 Allen (Mass.), 408.

<sup>8</sup> Buxton v. Somerset Potters' Works, 121 Mass. 446.

<sup>9</sup> Schwander v. Birge, 46 Hun (N. Y.), 66.

<sup>10</sup> Dow v. Julien, 32 Kan. 576.

party's negligence.<sup>1</sup> It has been held, too, that the opinion of a witness was inadmissible that it was not prudent to use a certain hoisting apparatus with less than three men, on a stone of two tons' heft.<sup>2</sup> In the case last cited the court says: "When this machine was fully described as to its structure, strength, methods of use, number of men required, danger in its use by less number, its safety and adequacy when properly used, the inference as to the prudence of undertaking to operate it on a stone of the size in question with only two men, was one which required no particular knowledge and skill, but rested in the sound judgment of the jurors, and one which they could as well decide for themselves."

In a case where it was claimed that a railroad company had been guilty of negligence in not removing certain brasses from the boxes of car wheels, it was held improper to ask an expert "when ought they to be removed?" The court says: "We think, however, that the proposed fact is not competent to be established by the opinion of a witness offered as an expert. The effects of allowing the brasses to become worn and thin and broken should be shown. Then the jury would be competent to determine whether it was negligence to fail to remove them before such condition existed. To allow a witness to testify as an expert to such fact would be to substitute the witness for the jury."<sup>3</sup>

<sup>1</sup> *Brant v. City of Lyons*, 60 Iowa, 172, 174.

<sup>2</sup> *Bemis v. Central Vermont R. R. Co.*, 58 Vt. 636.

<sup>3</sup> *Kitteringham v. The Sioux City, etc. R. R. Co.*, 62 Iowa, 285. The question had been asked in order to show that the brasses should be removed before they are worn as thin as a knife, before they become broken, or before the old axle-grease burns into the broken brass, there-

5. Intention or motive is an inferential fact to which a witness is ordinarily not allowed to testify in terms.<sup>1</sup>

6. A witness cannot testify whether, in his opinion, a certain thing is fair or not;<sup>2</sup> or give his opinion on matters of moral obligation.<sup>3</sup>

7. The opinion of a witness on a question of law or legal obligation is inadmissible,<sup>4</sup> except on the subject of foreign law in which case the opinions of persons skilled in the same may be received.<sup>5</sup>

8. As a rule, opinions are inadmissible on the measure of damages.<sup>6</sup> But this subject is fully considered in a subsequent chapter.<sup>7</sup>

9. Ordinarily the opinions of witnesses are inadmissible as to the meaning of English words,<sup>8</sup> but in action for slander or libel the principle is established that after evidence has been given to show that the words used may have conveyed a special meaning on the particular occasion the opinion of the witness

by causing a poisonous substance to accumulate on them—all of which counsel claimed constituted the elements of negligence.

<sup>1</sup> *Sharp v. Hall*, 86 Ala. 110; *Taylor v. Penquite*, 35 Mo. App. 389, 402.

<sup>2</sup> *Reid v. Ladue*, 66 Mich. 22, 26. And see section 11 of this chapter; *Adams v. Thornton*, 82 Ala. 260; *Manufacturers, etc. v. Koch*, 105 N. Y. 630; *Tait v. Hall*, 71 Cal. 149.

<sup>3</sup> See 1 Greenl. Evid. § 441.

<sup>4</sup> *Williams v. Souther*, 7 Iowa, 435; *Jackson v. Benson*, 54 Iowa, 654; *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197; *Fairchild v. Bascom*, 35 Vermont, 398; *Rodgers v. Kline*, 56 Miss. 808; *Lindauer v. Delaware Mut. Ins. Co.*, 13 Ark. 462; *Phelps v. Town*, 14 Mich. 374; *White v. Bailey*, 10 Mich. 155; *Stiles v. Steele*, 37 Kan. 552; *Shifflet v. Morelle*, 68 Texas, 382; *Moser v. Cochrane*, 107 N. Y. 35.

<sup>5</sup> See Chapter V.

<sup>6</sup> *Central R. Co. v. Kelly*, 58 Ga. 107; *Norman v. Wells*, 17 Wend. 136; *Bain v. Cushman*, 60 Vermont, 343.

<sup>7</sup> See Chapter VIII.

<sup>8</sup> *Hill v. King Mfg. Co.*, 79 Ga. 105; *Pennsylvania Co. v. Connell*, 127 Ill. 419; *Republican, etc. Co. v. Miner*, 12 Col. 86; *Commonwealth v. Marzynski*, 149 Mass. 68, 72.



as to their intended meaning is admissible.<sup>1</sup> Thus, it is said: "Something may have previously passed which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may from something which has gone before be restricted and confined to a particular sense or may mean something different from that which it ordinarily and usually does mean. But the proper course of a counsel who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant as spoken of the plaintiff, is to ask the witness not 'what did you understand by those words?' but 'was there anything to prevent those words from conveying the meaning which ordinarily they would convey?' because if there was, evidence of that may be given, and then the question may be put. When you have laid the foundation for it, the question may then be put 'what did you understand by them?' when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning."<sup>2</sup>

The right to introduce opinion evidence to explain the meaning of technical terms and unusual words is elsewhere considered.<sup>3</sup>

§ 6. **When Expert Testimony is Admissible.**—The rule is, that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason

<sup>1</sup> See *Odger on Libel and Slander*, 566. See *Gribble v. Pioneer Press Co.*, 37 Minn. 277.

<sup>2</sup> *Daines v. Hartley*, 3 Exch. 200.

<sup>3</sup> See the section on technical terms and unusual words in Chapter VI.

that the subject-matter so far partakes of the nature of a science, art or trade, as to require a previous habit, or experience, or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience, or common knowledge, but requires special experience, or special knowledge, then the opinions of witnesses skilled in the particular science, art or trade to which the question relates, are admissible in evidence.<sup>1</sup> "It is not because a man has a reputation for sagacity, and judgment, and

<sup>1</sup> *Folkes v. Chadd*, 3 Douglas (26 Eng. C. L. 63), 175; *Chaurand v. Angerstein*, Peake N. P. C. 61; *Campbell v. Ricards*, 5 Barn. & Ad. 840; *Davis v. State*, 38 Md. 15, 38; *City of Chicago v. McGiven*, 78 Ill. 347; *City of Parsons v. Lindsay*, 26 Kan. 426, 432; *Monroe v. Lattin*, 25 Kan. 351; *Roberts v. Commissioners of Brown County*, 21 Kan. 248; *Cromwell v. Western Reserve Bank*, 3 Ohio St. 406; *Cleveland, etc. R. R. Co. v. Ball*, 5 Ohio St. 568, 573; *Page v. Parker*, 40 N. H. 59; *Jones v. Tucker*, 41 N. H. 546; *Sowers v. Dukes*, 8 Minn. 23; *Cole v. Clark*, 3 Wis. 323; *Cottrill v. Myrick*, 12 Me. 222, 231; *Humphries v. Johnson*, 20 Ind. 190; *Dillard v. State*, 58 Miss. 368; *Wagner v. Jacob*, 26 Mo. 530; *Newmark v. Liverpool, etc. Ins. Co.*, 30 Mo. 165; *Whitmore v. Bowman*, 4 G. Greene (Iowa), 148; *Pelamourges v. Clark*, 9 Iowa, 1, 13; *Bearss v. Copley*, 10 N. Y. 95; *Robertson v. Stark*, 15 N. H. 109, 113; *Norman v. Wells*, 17 Wend. 136, 162; *Lincoln v. Saratoga, etc. R. R. Co.*, 23 Wend. 425, 432; *Terpenning v. The Corn Exchange Ins. Co.*, 43 N. Y. 279, 282; *Evansville R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Mish v. Wood*, 34 Pa. St. 451, 453; *Snow v. Boston, etc. R. R. Co.*, 65 Me. 230; *Tebbetts v. Haskins*, 16 Me. 283, 287; *Forbes v. Caruthers*, 3 Yeates (Penn.), 527; *Hastings v. Steamer Uncle Sam*, 10 Cal. 341; *Kline v. K. C., St. J., etc. R. R. Co.*, 50 Iowa, 656; *Hamilton v. Des Moines Valley R. R. Co.*, 36 Iowa, 31; *Bills v. Ottumwa*, 35 Iowa, 107; *Higgins v. Carlton*, 28 Md. 115; *Marshall v. Columbian, etc. Ins. Co.*, 7 Foster (N. H.), 157; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476, 481; *Milwaukee, etc. R. R. Co. v. Kellogg*, 94 U. S. 469, 473; *Lester v. Pitsford*, 7 Vt. 158; *Cavendish v. Troy*, 41 Vt. 99, 108; *Rochester, etc. R. R. Co. v. Budlong*, 10 How. Pr. 289, 291; *Slater v. Wilcox*, 57 Barb. 604, 608; *Taylor v. Town of Monroe*, 43 Conn. 36, 43; *State v. Clark*, 15 S. C. (N. S.) 403, 408; *Dowd v. Guthrie*, 13 Ill. App. 653; *Sallwasser v. Hazlit*, 18 Ill. App. 243; *Hilton v. Mason*, 92 Ind. 157; *Coyle v. Commonwealth*, 104 Pa. St. 117; *Clark v. Bruce*, 19 Hun (N. Y.), 274, 276; *Krippner v. Biebe*, 28 Minn. 140; *Stowe v. Bishop*, 58 Vt. 498, 501; *Milwaukee, etc. R. R. Co. v. Kellogg*, 94 U. S. 469; *Donnelly v. Fitch*, 136 Mass. 558.

power of reasoning," as Mr. Chief Justice SHAW has said, "that his opinion is admissible; if so, such men might be called in all cases, to advise the jury, and it would change the mode of trial. But it is because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt."<sup>1</sup> And the rule admitting the opinions of experts in such cases, is founded on necessity,<sup>2</sup> for juries are not selected with any view to their knowledge of a particular science, art or trade, requiring a course of previous study, experience and preparation.<sup>3</sup> It, therefore, becomes matter of necessity, when questions arise which do not lie within the ordinary information of men in general, but fall rather within the limits of some art or science, that juries should have the benefit to be derived from the opinions of witnesses possessing peculiar skill in the particular departments of knowledge to which such questions relate. So that it may be said that the foundation on which expert testimony rests, is the supposed superior knowledge or experience of the expert in relation to the subject-matter upon which he is permitted to give an opinion as evidence.<sup>4</sup> And it has been said that it is because all persons have not the leisure or capacity to master the principles of art or science, that those who are specially skilled

<sup>1</sup> *New England Glass Co. v. Lovell*, 7 Cush. 319.

<sup>2</sup> *State v. Clark*, 12 Ired. (N. C.) Law, 152, 153; *City of Chicago v. McGiven*, 78 Ill. 347.

<sup>3</sup> *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 457.

<sup>4</sup> *Clark v. Rockland Water Power Co.*, 52 Me. 68, 77.



in either, are allowed to give their opinions in evidence.<sup>1</sup>

The Supreme Court of New Hampshire, in declaring under what circumstances the testimony of experts may be properly received in evidence, has classified the cases under three heads, and declares that experts may give their opinions:

1. Upon questions of science, skill or trade, or others of like kind.

2. When the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance.

3. When the subject-matter of investigation so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it.<sup>2</sup>

The following statement of the law upon this point is to be found in a decision of the Supreme Court of Iowa: "It is often very difficult to determine in regard to what particular matters and points witnesses may give testimony by way of opinion. It is doubtful whether all the cases can be harmonized, or brought within any general rule or principle. The most comprehensive and accurate rule upon the subject, we believe to be as follows: That the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such, that inexperienced persons are not likely to prove capable of forming a correct judgment upon it, without such assistance; in other words, when it so far partakes of the nature of a science, as to re-

<sup>1</sup> *Atchison, etc. R. R. Co. v. United States*, 15 Ct. of Claims, 140.

<sup>2</sup> *Jones v. Tucker*, 41 N. H. 546.

quire a course of previous habit or study in order to the attainment of a knowledge of it, and that the opinions of witnesses cannot be received when the inquiry is into a subject-matter, the nature of which is not such as to require any particular habits of study in order to qualify a man to understand it. If the relations of facts and their probable results can be determined without especial skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury.”<sup>1</sup> “The true test,” says the Supreme Court of Connecticut, “of the admissibility of such testimony, is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions, founded on such knowledge or experience, any aid to the court or to the jury in determining the questions at issue.”<sup>2</sup>

The New York Court of Appeals has laid down the following rule: “It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have.”<sup>3</sup>

<sup>1</sup> *Muldowney v. Illinois Central R. R. Co.*, 36 Iowa, 472.

<sup>2</sup> *Taylor v. Town of Monroe*, 43 Conn. 36, 44.

<sup>3</sup> *Ferguson v. Hubbell*, 97 N. Y. 507, 513.

And in a well considered case in the Supreme Court of New York the rule was stated as follows: "The governing rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it."<sup>1</sup> Expert testimony is admissible when the question involved is one of professional or scientific knowledge.<sup>2</sup>

§ 7. **Meaning of the Terms "Science" and "Art."**—It is sometimes laid down in a general way, that the opinions of experts are admissible only when the subject-matter of inquiry relates to some "science" or "art." It is to be observed, however, that these words include all subjects on which a course of special study or experience is necessary to the formation of an opinion,<sup>3</sup> and that it is not necessary "that a specialty to enable one of its practitioners to be examined as an expert, should involve abstruse scientific conditions."<sup>4</sup> "Art, in its legal significance, embraces every operation of human intelligence, whereby something is produced outside of nature; and the term 'science' includes all human knowledge which has been generalized, and systematized, and has obtained method, relations and the forms of law."<sup>5</sup> So that while it may be laid

<sup>1</sup> Schwander v. Birge, 46 Hun (N. Y.), 66, 70.

<sup>2</sup> Van Wycklen v. City of Brooklyn, 41 Hun (N. Y.), 418.

<sup>3</sup> Stephen's Dig. of Law of Evid. Art. 49, p. 104.

<sup>4</sup> Story v. MacLay, 3 Mon. (Ky.) 480, 483.

<sup>5</sup> Atchison, etc. R. R. Co. v. United States, 15 Ct. of Claims, 140, per Davis, J.



down that the opinions of experts are limited to matters of science, art or skill, yet this limitation is not applied in any rigid or narrow sense.<sup>1</sup> And every business or employment, which has a particular class devoted to its pursuit, is said to be an art or trade, within the meaning of the rule.<sup>2</sup> As has been said in the Irish Exchequer Chamber by Pigot, C. B., "the subjects to which this kind of evidence is applicable, are not confined to classed and specified professions. It is applicable wherever peculiar skill and judgment, applied to a particular subject, are required to explain results, or trace them to their causes."<sup>3</sup>

§ 8. **When the Opinions of Experts are Inadmissible.**—The rule is well established that the opinions of experts cannot be received in evidence in cases where the subject-matter of inquiry is such that it may be presumed to lie within the common experience of all men of common education, moving in the ordinary walks of life.<sup>4</sup> The opinions of such witnesses are inadmissible where the inquiry is into

<sup>1</sup> *Clifford v. Richardson*, 18 Vt. 620, 627; *Sturgis v. Knapp*, 33 Vt. 486, 531.

<sup>2</sup> *Rochester, etc. R. R. Co v. Budlong*, 10 How. Pr. 289, 291; and *Taylor v. Town of Monroe*, 43 Conn. 36, 43.

<sup>3</sup> 1 Irish R. (Com. L.) 211, 218.

<sup>4</sup> *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319; *Shafter v. Evans*, 53 Cal. 32; *City of Chicago v. McGiven*, 78 Ill. 347; *Naughton v. Stagg*, 4 Mo. App. 271; *Cook v. State*, 24 N. J. Law, 843, 852; *Dillard v. State*, 58 Miss. 368; *Gavick v. Pacific R. R. Co.*, 49 Mo. 274; *Concord Railroad Co. v. Greely*, 3 Foster (N. H.), 237, 243; *Nashville, etc. R. R. Co. v. Carroll*, 53 Tenn. 347; *Linn v. Sigsbee*, 67 Ill. 75; *Veerhusen v. Chicago, etc. R. R. Co.*, 53 Wis. 689, 694; *White v. Ballou*, 8 Allen, 408; *Hovey v. Sawyer*, 5 Allen, 554; *Perkins v. Augusta, etc. Banking Co.*, 10 Gray, 312; *Clark v. Fisher*, 1 Paige Ch. 171; *s. c.*, 19 Am. Decis. 402; *Monroe v. Lattin*, 25 Kan. 351, 354; *People v. Mullen*, 96 N. Y. 408; *Baltimore, etc. R. R. Co. v. Leonhardt*, 66 Md. 77, 78; *State v. Anderson*, 10 Oregon, 448.

a subject, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it, men of common information being capable of forming a judgment thereon.<sup>1</sup>

If the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then the opinions of experts cannot be received in evidence.<sup>2</sup> "To require the exclusion of such evidence," says the New York Court of Appeals, "it is not needed that the jurors should be able to see the facts as they appear to eye-witnesses, or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them and comprehend them sufficiently for the ordinary administration of justice."<sup>3</sup> The Supreme Court of Pennsylvania, speaking of the same matter, says: "How any person can be said to be an expert in that which is not and cannot be followed as a business, or in that which must necessarily result from observation of a character so general that it must be common to every person, we cannot understand.

<sup>1</sup> *Ferguson v. Hubbell*, 97 N. Y. 507, 513; *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93; *De Berry v. C. C. R. R. Co.*, 100 N. C. 310, 315, (1888); *Welch v. Ins. Co.* 23 W. Va. 288, 306; *Gutridge v. Missouri, etc. R. R. Co.*, 94 Mo. 468, 473; *State v. Sorenson*, 32 Minn. 120.

<sup>2</sup> *Stafford v. City of Oskaloosa*, 64 Iowa, 251; *Neillson v. Chicago, etc. R. R. Co.*, 58 Wis. 576; *Stumore v. Shaw*, 68 Md. 11, 19, (1887); *Mayhew v. Sullivan Mining Co.*, 76 Me. 100; *St. Louis, etc. R. R. Co. v. Ritz*, 33 Kan. 404; *Kansas, etc. R. R. Co. v. Peavey*, 29 Kan. 170; *Amadon v. Ingersoll*, 34 Hun (N. Y.), 132, 134.

<sup>3</sup> *Ferguson v. Hubbell*, 97 N. Y. 507, 513.

The opinion of a witness who neither knows, nor can know, more about the subject-matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible." <sup>1</sup>

§ 9. **The Question of Admissibility of Expert Testimony is for the Court.**—The question whether the subject-matter of inquiry in a particular case is of such a nature that it does not lie within the common experience of all men of common education so that the testimony of experts is admissible in evidence, is a question which must be determined by the court. All the cases recognize the rule that it is for the court to determine whether the subject-matter is one of science, art or trade, or whether it is a matter of common experience. <sup>2</sup>

§ 10. **Cases Illustrative of the Inadmissibility of the Opinions of Experts.**—While there is no doubt as to the general rule stated in the preceding section, it is often found exceedingly difficult to determine whether the facts to be examined are such as lie within the common experience of all men of common education, or whether they lie outside the range of ordinary intelligence. And the decisions are found to be by no means clear or satisfactory upon the distinctions between facts that lie within common experience and ordinary intelligence, and those that lie beyond them. The principles on which the authorities rest have been very truly pronounced more consistent than the attempts which have been made to apply them in actual practice. <sup>3</sup>

<sup>1</sup> Franklin Ins. Co. v. Gruver, 100 Pa. St. 266, 273.

<sup>2</sup> See Dillard v. The State, 58 Miss. 368, 388; Campbell v. Russell, 139 Mass. 278.

<sup>3</sup> Evans v. The People, 12 Mich. 27.



In illustration of the general principle that the opinions of experts will not be received as to facts within the common experience of men, we shall notice the following cases: Where one was indicted under a statute making it an offense to sell an obscene or indecent book, writing, picture or photograph, the question of obscenity or indecency was considered as falling within the range of ordinary intelligence, so that it was not necessary to have an expert in literature or art to determine it.<sup>1</sup>

That expert evidence was not admissible to show that actual danger from fire to certain premises had been increased by the erection of adjacent buildings.<sup>2</sup> That it could not be received on the question whether the position of certain canal boats was a proper or improper position in which to lie at night.<sup>3</sup>

It has been held that the opinion of one whose occupation was the braking and switching of cars, was inadmissible on the question of whether it would be prudent for a man to stand any other way than flatwise in making a coupling of cars, and whether it was considered safe or unsafe among brakemen to stand facing the draft iron while making the coupling.<sup>4</sup> That a railroad expert could not be asked whether the time which a railroad train stopped at a station was sufficient to enable passengers to get off.<sup>5</sup> That a railroad conductor could not be asked whether a person would have been thrown from the cars, if, at the time of the cars

People v. Muller, 96 N. Y. 408.

<sup>2</sup> Franklin Fire Ins. Co. v. Gruver, 100 Pa. St. 266. See chapter VI.

<sup>3</sup> Case v. Perew, 46 Hun (N. Y.), 57.

<sup>4</sup> Belair v. The C. & N. W. R. Co., 43 Iowa, 667; Muldowney v. Illinois Cent. R. R. Co., 36 Iowa, 472.

<sup>5</sup> Keller v. N. Y. Central R. R. Co., 2 Abbott (Ct. of App.), 480.

striking, he had been holding on to the brakes, and exercising ordinary care and prudence in his own protection and preservation.<sup>1</sup> That an experienced railroad man could not be asked the following question: "Suppose there was a man standing by the side of a switch that night, and holding a lantern, such as you have described, a foot or two from the ground, how far away from the target could the man see the top of the target, or any part of the target above the lantern?"<sup>2</sup>

So it has been held that a medical expert who had testified as to the injury of the plaintiff's fingers being very severe—that the fingers were badly mashed—that the middle finger was quite stiff, and forefinger permanently stiff—could not answer the following questions:

"I will ask you to state to what extent the injury impairs the usefulness of that hand for any skilled occupation, or any occupation requiring a quick and ready use of the hand?"

"State the degree to which the usefulness of that hand would be impaired for skilled labor, requiring a quick and ready use of the fingers, such as coupling and braking cars on the railroad?"<sup>3</sup>

That a physician could not testify as to the possibility of a rape having been committed in a particular manner, described by the prosecutrix. "No peculiar knowledge of the human system was necessary to answer it. It was a mere question of relative strength or mechanical possibility, which an athlete or a mechanic could have answered as well as a

<sup>1</sup> *Gavisk v. Pacific R. R.*, 49 Mo. 274.

<sup>2</sup> *Weane v. K. & D. M. R. Co.*, 45 Iowa, 246.

<sup>3</sup> *Kline v. The K. C., St. J. & C. B. R. Co.*, 50 Iowa, 656.

physician, and every man upon the jury as well as either.”<sup>1</sup>

That brokers and bankers could not be asked whether brokers and bankers would discount a note of the appearance of the one in question, without a wilful failure to inquire into the circumstances under which it was obtained—the note was written on tracing paper.<sup>2</sup>

That detectives could not express an opinion as to whether it was possible to commit a robbery in the manner charged.<sup>3</sup> That a surveyor could not express an opinion as an expert as to where the highest part of a hill was.<sup>4</sup> That an innkeeper could not express an opinion as to whether it was safe for a guest to keep his money in a locked trunk.<sup>5</sup>

That firemen, long connected with a city fire department—to whom had been presented a plan of the buildings, with a statement of the distances between them, the materials of which they were constructed, the direction of the wind, the state of the weather, and the fact that no water was used on the fire—could not be asked whether or not, in their opinion, the dwelling house and connected buildings would take fire from the barn; whether or not it was a common occurrence for fire to be communicated from leeward to windward across a space greater than twenty-six feet; whether or not, in their experience, large wooden buildings or large

<sup>1</sup> Cook v. State, 24 N. J. Law, 843.

<sup>2</sup> Rowland v. Fowler, 37 Conn. 348.

<sup>3</sup> People v. Morrigan, 29 Mich. 1. “If experts were allowable on questions of criminal science, the professors and practitioners of that science would naturally be the experts needed.”

<sup>4</sup> Hovey v. Sawyer, 5 Allen (Mass.), 554.

<sup>5</sup> Taylor v. Monnot, 4 Duer (N. Y.), 116.



fires made their own currents, frequently eddying against the prevailing wind.<sup>1</sup>

That an expert accustomed to the use of fire-arms could not be asked whether a certain piece of paper had been used as wadding, and as such shot from a loaded gun.<sup>2</sup> That the question whether the deceased, seated at or near a window, through which he was shot, could have seen and recognized the person on the outside who inflicted the wound, was not one of skill or science, and that, therefore, experiments made by others, and the results thereof, and opinions founded thereon, were inadmissible.<sup>3</sup>

That the opinion of a person experienced in clearing land by fire was inadmissible, as to the probability that a fire set under the circumstances described by the witnesses, would have spread to the adjoining land.<sup>4</sup>

Whether glass placed in a sidewalk to afford light to the area below is unsafe, by reason of the too great smoothness or slipperiness of its surface, is not a question of science or skill such as to render the opinions of witnesses admissible.<sup>5</sup> So it has been said that whether a street crossing is unsafe and dangerous is not a question of science or skill, upon which it is proper to receive the opin-

<sup>1</sup> State v. Watson, 65 Me. 74.

<sup>2</sup> Manke v. People, 24 Hun (N. Y.), 316; s. c., 78 N. Y. 611. The court said it could have been determined by a jury from a description of the facts touching the appearance of the paper when found, such as the manner in which it was folded, whether it appeared to have been partially burned, whether it bore upon its creases traces of powder stains, etc.

<sup>3</sup> Jones v. State, 71 Ind. 66.

<sup>4</sup> Higgins v. Dewey, 107 Mass. 494. And see Fraser v. Tupper, 29 Vt. 409.

<sup>5</sup> City of Chicago v. McGiven, 78 Ill. 347.

ions of witnesses.<sup>1</sup> In Wisconsin it is said that "possibly there might be cases in which the opinions of experts might be admissible upon matters going to the sufficiency of a highway. Generally, however, it is a pure question of fact, not of science or skill."<sup>2</sup>

§ 11. **Inadmissibility of Opinions Founded on a Theory of Morals or Duty.**—The opinion of a witness, not founded on science, but as a theory of morals or duty, is inadmissible in evidence, whether given by professional or unprofessional witnesses. Hence, where the question was whether a man who had committed suicide was sane or insane, the opinion of a physician that no sane man would commit suicide in a Christian country, was held inadmissible, as being founded, not on the phenomena of mind, but rather on a theory of morals, religion and a future state.<sup>3</sup> And the opinions of medical practitioners are inadmissible on the question whether a physician has honorably and faithfully discharged his duty to his medical brethren.<sup>4</sup> So it has been held that the opinion of an attorney, that a certain transaction was an honest one, was inadmissible.<sup>5</sup>

The opinions of experts are ordinarily inadmissible on questions of duty. Thus, it has been held that the opinions of tenders of draw-bridges were inadmissible as to the necessity of keeping gates shut, and hanging out lanterns for the proper pro-

<sup>1</sup> *City of Parsons v. Lindsay*, 26 Kan. 426, 432.

<sup>2</sup> *Benedict v. City of Fond du Lac*, 44 Wis. 496. And see *Oleson v. Tolford*, 37 Wis. 327; *Montgomery v. Scott*, 34 Wis. 338.

<sup>3</sup> *St. Louis Mutual Life Ins. Co. v. Graves*, 6 Bush (Ky.), 290. See *Frary v. Gusha*, 59 Vt. 257.

<sup>4</sup> *Ramadge v. Ryan*, 9 Bing. 333.

<sup>5</sup> *Sweet v. Wright*, 62 Iowa, 215.

tection of travelers, while a draw was open in the night time.<sup>1</sup> So while witnesses cannot be permitted to express an opinion that a person performed a certain service in the manner required of him in the proper discharge of his duty, yet it is competent for any witness having personal knowledge of the facts to state what services are performed, by persons employed in a certain capacity, in the discharge of their duty.<sup>2</sup>

§ 12. **Inadmissibility of Opinions on Abstract Questions of Science, not Related to the Facts in Issue.**—The opinions of professional witnesses cannot be asked upon mere abstract questions of science, having no proper relation to the facts upon which the jury are to pass. The opinion of an expert, to be admissible, on the direct examination, must always be predicated upon, and relate to the facts disclosed by the evidence in the case.<sup>3</sup>

§ 13. **Inadmissibility of Opinions Based on Speculative Data.**—The rule is, that the opinions of experts are not admissible when based on merely speculative data.<sup>4</sup> On a trial for murder, where the question was asked whether the deceased was not addicted to the excessive use of snuff and violent fits of passion, the evidence being desired as a basis for the introduction of expert testimony, to prove that such habits and temperament indicated the

<sup>1</sup> Nowell v. Wright, 3 Allen (Mass.), 166, 170. And see Raymond v. City of Lowell, 6 Cush. (Mass.) 524, 531; Grand Rapids, etc. R. R. Co. v. Ellison, 117 Ind. 234, 241.

<sup>2</sup> Allen v. Railroad Co., 57 Iowa, 626; Missouri, etc. R. R. Co. v. Mackey, 33 Kan. 299.

<sup>3</sup> Champ v. Commonwealth, 2 Met. (Ky.) 18.

<sup>4</sup> Cooper v. State, 23 Texas, 336, 337. And see Winter v. City Council, 79 Ala. 481.



probable presence of a condition from which sudden death might well have resulted, without reference to the blow given by the prisoner, it was held that such expert testimony could not be received, as no evidence had been introduced, and none offered, to prove that the deceased was in a violent fit of passion, or had taken an overdose of snuff at the time the blow was struck. The court ruled the testimony inadmissible, as being speculative in its nature.<sup>1</sup> And where it did not appear that the medical witness had been present at the *post-mortem* examination, or that he had any knowledge of the case, or the kind, or extent of the examination needed, the court refused to allow him to answer the following question: "For the purpose of arriving at a correct conclusion in the case of the death of a person, where you don't know to your own satisfaction what caused the death, how long a time should two men give to a *post-mortem* examination? And would four hours be sufficient?"<sup>2</sup> So an engineer has not been permitted to express an opinion as to the original purpose in view, in building a wall which had been standing between twenty or thirty years.<sup>3</sup> The Supreme Court of Mississippi has held it to be incompetent to show by the testimony of professional persons, in impeachment of the mother's testimony, in a prosecution for bastardy, that it was highly improbable that impregnation could be produced by the first act of coition.<sup>4</sup> Such testimony was said to be too uncertain, indefinite, and hypothetical to form the basis of judicial

<sup>1</sup> *Ebos v. State*, 34 Ark. 520.

<sup>2</sup> *State v. Pike*, 65 Me. 111.

<sup>3</sup> *Sinnott v. Mullin*, 82 Pa. St. 342.

<sup>4</sup> *Anonymous*, 37 Miss. 54.

action. "The courts, in our opinion," it is said, "have gone quite far enough in subjecting the life, liberty and property of the citizen to the mere speculative *opinions* of men claiming to be *experts* in matters of science, whose confidence, in many cases, bears a direct similitude and ratio to their ignorance. We are not disposed to extend this doctrine into the field of hypothetical conjecture and probability, and to give certainty as evidence, to that which, in its very nature, must be wholly uncertain and unsatisfactory; dependent on circumstances and conditions entirely secret, hidden and unknown, as facts, and without a knowledge of which, neither science nor experience, could afford us the remotest information."

But an expert, speaking on a question of science, can be asked, in presence of a given effect, of what causes it either was, or might be the resultant. Such an inquiry is not regarded as speculative in any objectionable sense, but is a common and proper mode of examination.<sup>1</sup> One, however, who is not an expert, cannot ordinarily give his opinion as to the cause of a given effect.<sup>2</sup>

§ 14. **Admissibility of the Testimony of Experts Who Have Made Ex Parte Investigations.**—In many cases it is no doubt advisable that notice should be given to the opposing interest of an intention to have experts make an investigation of the facts involved in the particular case. And whenever practicable it would be proper that such notice should be given. Of course, in the case of public officers carrying on an investigation immediately after the com-

<sup>1</sup> Moyer v. N. Y. Central, etc. R. R. Co., 98 N. Y. 646.

<sup>2</sup> Shaw v. Susquehanna Boom Co., 125 Pa. St. 324.

mission of a crime, their public action may no doubt be considered adequate notice of their proceedings to all parties. But the question has been raised whether notice is not essential when it is desired to make an examination after the preliminary inquiries conducted by the magistrates have been terminated. The opinion has been expressed by distinguished writers on medical jurisprudence that not only is notice to opposing interests desirable in such cases, but that "there can be no question that when the question comes fairly up such examination, when taken flagrantly *ex parte* at a time when there could readily have been notice to the opposite side, will be ruled out as inadmissible."<sup>1</sup> In this, we think, they are mistaken; not only has the practice been to receive the testimony of experts who have made *ex parte* investigations, but, in our opinion, it is entirely proper that the testimony should be allowed to go to the jury, whose duty it is to determine the weight to be accorded to it in the light of all the circumstances, the character of the experts, the care and skill with which they appear to have carried on their investigations, and the manner in which they sustain themselves on the cross-examination. No necessity exists for excluding the testimony of an expert as to the facts which he has learned merely because his knowledge of the facts was acquired at a time and place when the opposite party was not present. Both on principle and authority such testimony is admissible in evidence.<sup>2</sup>

When a *post-mortem* examination of a deceased

<sup>1</sup> Wharton and Stile's Medical Jurisprudence, Sec. 1246.

<sup>2</sup> *People v. Foley*, 64 Mich. 148, (1887); *State v. Leabo*, 89 Mo. 247, (1886); *State v. Brooks*, 92 Mo. 542, 579, (1887); *State v. Bowman*, 80 N. C. 432, 437, (1879).



person is made, the admissibility of the testimony of the physicians who made it does not at all depend on the thoroughness of the examination which they made.<sup>1</sup> In the case cited, the question was whether death had been caused by internal disease or external violence. And the physicians were allowed to express an opinion thereon, although their examination had not been sufficiently thorough to enable them to state that no other cause existed than the one they assigned, to which the death could be attributed.

<sup>1</sup> State v. Porter, 34 Iowa, 131, 134.

## CHAPTER II.

## THE COMPETENCY OF EXPERT WITNESSES.

## SECTION.

15. The Qualification of the Witness to Testify as an Expert Must First be Shown.
16. The Competency of the Witness a Question for the Court.
17. Preliminary Examination of the Expert.
18. Competency of Experts Whose Knowledge is Derived from Experience.
19. Competency of Experts Whose Knowledge is Derived from Study.
20. Competency of Experts Whose Knowledge is Derived from Observation.
21. Upon What the Competency of Experts Rests.
22. The Competency of the Witness as a Subject of Review in an Appellate Court.
23. How the Objection to the Competency Should be Taken.
24. Competency as Dependent on Whether the Expert has Heard the Testimony.
25. Competency of Experts in Particular Cases.

§ 15. **The Qualification of the Witness to Testify as an Expert Must First be Shown.**—It having been determined that the subject concerning which the witness is to testify is one upon which the opinion of an expert can be received, the next question which arises is whether the witness is possessed of the qualifications necessary to entitle him to testify as an expert. That he is possessed of the requisite qualifications must appear in evidence before he can

properly be permitted to give expert testimony.<sup>1</sup> It would be as improper to allow a witness to testify as an expert without first showing that he was possessed of the peculiar knowledge or skill which one must have to be an expert, as it would be to allow secondary evidence of the contents of a lost paper without having first shown that the paper was lost, and that a diligent and thorough search for it had been made without finding it.<sup>2</sup>

§ 16. **Competency of the Witness a Question for the Court.**—The question whether the witness possesses the necessary qualifications to render him competent to testify in the character of an expert, is a preliminary question addressed to the court, which should be satisfied upon that point, by the presentation of proper evidence.<sup>3</sup> The question must be determined by the court, and cannot be

<sup>1</sup> *Chicago & Alton R. R. Co. v. Springfield & Northwestern R. R. Co.*, 67 Ill. 142; *Heald v. Thing*, 45 Me. 392; *State v. Secrest*, 80 N. C. 450; *Washington v. Cole*, 6 Ala. 212; *Tullis v. Kidd*, 12 Ala. 648; *State v. Ward*, 29 Vt. 225, 236; *Tyler v. Todd*, 36 Conn. 218, 221; *Sandwich Mfg. Co. v. Nicholson*, 32 Kan. 666; *Citizens' Gas Light & Heating Co. v. O'Brien*, 15 Brad. (Ill.) 400, 409; *Harris v. Township of Clinton*, 64 Mich. 457.

<sup>2</sup> See *Jones v. Tucker*, 41 N. H. 546.

<sup>3</sup> *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453, 460; *Lincoln v. Inhabitants of Barre*, 5 Cush. 591; *Flynt v. Bodenhamer*, 80 N. C. 205, 207; *Gulf City Ins. Co. v. Stephens*, 52 Ala. 121; *Forgery v. First National Bank*, 66 Ind. 123; *Davis v. State*, 35 Ind. 496; *Boardman v. Woodman*, 47 N. H. 120, 135; *Sorg v. First German Congregation*, 63 Penn. St. 156; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765, 772; *Chandler v. Thompson*, 30 Fed. Rep. 38; *State v. Cole*, 63 Iowa, 695; *Broquet v. Tripp*, 36 Kan. 700; *Carpenter v. Corinth*, 58 Vt. 214, 216; *Reynolds v. Lounsbury*, 6 Hill (N. Y.), 534; *Sikes v. Paine*, 10 Ired. (N. C.) Law, 282; *State v. Secrest*, 80 N. C. 450; *Washington v. Cole*, 6 Ala. 212; *Tullis v. Kidd*, 12 Ala. 648; *Woodman v. Dana*, 52 Me. 9, 13; *Delaware, etc. Steam Towboat Co. v. Starrs*, 69 Penn. St. 36; *Jones v. Tucker*, 41 N. H. 546; *Snowden v. Idaho Quartz Mfg. Co.*, 55 Cal. 450; *McEwen v. Bigelow*, 40 Mich. 217; *Ives v. Leonard*, 50 Mich. 296; *State v. Ward*, 29 Vt. 225, 236.



referred by it to the jury.<sup>1</sup> And in determining whether the witness is a person of skill, in the particular department or subject-matter in which his opinion is desired, very much is left to the discretion of the presiding judge.<sup>2</sup> The right to review his decision in an appellate court will be subsequently considered.

In a case tried by a referee, the qualification of the witness to give opinion evidence is a question to be determined by the referee at the trial.<sup>3</sup>

§ 17. **Preliminary Examination of Expert.**—For the purpose of determining the competency of the witness, a preliminary examination takes place, in which the witness may be asked to state his acquaintance with the subject-matter in reference to which his opinion is desired, and what he has done to qualify himself as an expert in that particular department of inquiry.<sup>4</sup> But the opinion of the witness as to whether he considers himself qualified to give an opinion as an expert would seem to be irrelevant, as that is a question for the court alone.<sup>5</sup> The court is also at liberty to examine other

<sup>1</sup> *Fairbank v. Hughson*, 58 Cal. 314. In this case the Supreme Court of California reversed a judgment, because the trial court allowed a book-keeper in a bank to testify (having been offered as an expert in handwriting), with the remark: "I shall hold it is for the jury to say how much he knows about it. I will admit the testimony." And see *Heacock v. State*, 13 Tex. Ct. of App. 97, 131.

<sup>2</sup> *Hills v. Home Ins. Co.*, 129 Mass. 345; *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544, 551; *Tucker v. Massachusetts Central R. R. Co.*, 118 Mass. 546; *Lawrence v. Boston*, 119 Mass. 126; *Lawton v. Chase*, 108 Mass. 238, 241; *Berg v. Spink*, 24 Minn. 138, 139; *Howard v. Providence*, 6 R. I. 516; *Ardesco Oil Co. v. Gilson*, 63 Penn. St. 146, 152; *Krippner v. Biebl*, 28 Minn. 139; *Sarle v. Arnold*, 7 R. I. 586; *Delaware, etc. Steam Towboat Co. v. Starrs*, 69 Penn. St. 36.

<sup>3</sup> *Goodwin v. Scott*, 61 N. H. 112.

<sup>4</sup> *Boardman v. Woodman*, 47 N. H. 120, 135.

<sup>5</sup> *Boardman v. Woodman*, 47 N. H. 120; *Naughton v. Stagg*, 4 Mo. App. 27.

witnesses to aid it in determining whether he is qualified to draw correct conclusions upon questions relating to the science or trade in relation to which he is to be examined.<sup>1</sup> In a case where it was contended that no evidence of the qualifications of a person to testify as an expert was admissible until the expert himself had been introduced as a witness upon the stand, and an opportunity afforded for a cross-examination, the court declared that its attention had not been called to any such rule, and it thought none such existed, and added: "Any evidence tending to show that the witness called as an expert possesses the requisite knowledge and skill is, we think, admissible for what it is worth."<sup>2</sup> On this preliminary examination the court simply decides upon proof of the opportunities which the witness has had for acquiring special knowledge and experience in the subject-matter, that the jury may hear his opinion as a person of science and skill.<sup>3</sup>

It is not easy for an incompetent person to sustain himself in the character of an expert witness. Consequently, on the preliminary question as to the qualifications of the witness to testify as an expert, it is not often the case that the subject is very fully gone into. The witness is usually allowed, after slight evidence as to his qualifications has been given, to testify in the character of an expert, it being left to counsel on the cross-examination, and otherwise, to show the absence of qualification, and

<sup>1</sup> *Mendum v. Commonwealth*, 6 Rand. (Va.) 704, 710; *Tullis v. Kidd*, 12 Ala. 648; *Laros v. Commonwealth*, 84 Pa. St. 200; *Mason v. Phelps*, 48 Mich. 127.

<sup>2</sup> *State v. Maynes*, 61 Iowa, 119.

<sup>3</sup> *State v. Secrest*, 80 N. C. 450, 457.

the consequent worthlessness of the testimony. But if opposing counsel think the evidence of qualification is insufficient to establish the right of the witness to testify as an expert, their proper course is to object on that specific ground. For if no such objection is interposed the court may assume that counsel is satisfied as to the competency of the witness,<sup>1</sup> and counsel may, as a consequence, be prevented from having the matter reviewed in the higher court.<sup>2</sup>

When it is made to appear *prima facie* that the witness possesses the qualifications of an expert, the court may admit the testimony, and is not bound to allow a preliminary cross-examination.<sup>3</sup> Opposing counsel have the opportunity on the cross-examination in chief to impeach his skill and test his competency.

Of course it is error to allow a witness to testify as an expert without some preliminary examination as to his qualifications.<sup>4</sup> But whether counsel can avail themselves of the error will depend on circumstances, elsewhere considered.<sup>5</sup>

§ 18. **Competency of Experts Whose Knowledge is Derived from Experience.**—We have seen that the ground on which expert testimony is received in evidence is, that the subject in controversy depends on science or peculiar skill or knowledge. We have also seen that before a witness can be allowed to give testimony as an expert it must be made to

<sup>1</sup> See *The State v. Cole*, 63 Iowa, 695, 699.

<sup>2</sup> See section 22.

<sup>3</sup> *Sarle v. Arnold*, 7 R. I. 582; *City of Fort Wayne v. Combs*, 107 Ind. 75, 85.

<sup>4</sup> *State v. Secrest*, 80 N. C. 450.

<sup>5</sup> See section 23.



appear that he *is* an expert or experienced person in the matter concerning which he is to testify. The peculiar skill, knowledge or experience which qualifies one to testify as an expert is, as a general rule, that which has been acquired by the witness in his trade, profession or calling.<sup>1</sup> A person engaged in a particular profession, trade or calling is presumed to understand thoroughly the questions pertaining to such profession, trade or calling, and to be competent to testify in respect to the same.<sup>2</sup>

But in such cases the competency of the witness to testify does not depend on his being actually engaged in the practice of the profession, trade or calling at the time he gives his testimony, he having been previously employed therein.<sup>3</sup> Hence one who, at the time he was offered as a witness was a student at law, has been allowed to testify as an expert in the tanning business, he having formerly been employed in that trade.<sup>4</sup> "There was nothing in the change of employment, from tanning hides to the study of the law, which would necessarily deprive him of the skill acquired in his original trade."

The mere fact that the witness was at one time and in former years engaged in the practice of the art or trade would not, in every case, make it the duty of the court to allow him to testify as an expert in regard to the same. In a case where one

<sup>1</sup> *Lincoln v. Inhabitants of Barre*, 5 Cush. 591.

<sup>2</sup> *Missouri, etc. R. R. Co. v. Finley*, 38 Kan. 550.

<sup>3</sup> *Vander Donckt v. Thellusson*, 8 Man. G. & S. (65 Eng. C. L.) 812. "Whatever the line of business he now follows, if he was an expert before, he can hardly be said to be less so now," per Mr. Justice Maule. See, too, *Roberts v. Johnson*, 58 N. Y. 613; *Tullis v. Kidd*, 12 Ala. 648, 650.

<sup>4</sup> *Bearss v. Copley*, 10 N. Y. 95.

was offered as an expert in a matter of plumbing, and it appeared that he had been a plumber many years ago, but had not been such for twenty years, it was held that the trial court committed no error in declining to receive his testimony.<sup>1</sup> It is evident that in all such cases the question of competency must depend largely on the nature of the trade or occupation, as well as on the length of time since the witness abandoned it.

The kernel of this character of expert is said to be the fact of peculiar knowledge or skill derived from experience in the particular matter in question.<sup>2</sup> And the court should be satisfied that he is possessed of this peculiar knowledge or skill at the time he gives his testimony. If not possessed by the witness at that time it avails nothing that he was possessed of it at some former time, but if he has practical skill or scientific knowledge and experience as to the matters under investigation, he is competent to testify.<sup>3</sup>

We have stated at the beginning of this section that the peculiar skill or knowledge which entitles a witness to testify as an expert is usually that which the witness has derived from his trade, profession or calling. While this is usually the case it has been held to be not in every case necessarily so. If the witness has been so instructed by experience as to have peculiar sources of knowledge to guide him on the subject under investigation, fitting him to answer with more accuracy than others, he has been said to be a competent witness to express an opinion in relation to the

<sup>1</sup> *McEwen v. Bigelow*, 40 Mich. 215.

<sup>2</sup> *Wright v. Williams' Estate*, 47 Vt. 222, 223.

<sup>3</sup> *The Sioux City, etc. R. R. Co. v. Finlayson*, 16 Neb. 578, 587.

same.<sup>1</sup> The matter was well put by Mr. Justice Talcott of New York, when he said: "The opinions of experts are only admissible when it appears from the nature of their avocations, or from their testimony concerning their experience, that the matter inquired about involves some degree of science or skill which they have made use of, so that from experience they are fitted to answer the question propounded with more accuracy than others, who may not have been called upon to employ science or exercise skill on the subject."<sup>2</sup> In the Court of Appeals of Maryland, the principle is stated as follows: "When the subject under investigation is one requiring special skill and knowledge, they (the jury) may be aided by the opinions of persons whose pursuits or studies or experience have given them a familiarity with the matter in hand."<sup>3</sup>

In the Supreme Court of Pennsylvania, it is said: "It was said by the present chief justice that no clearly defined rule can be found as to what constitutes an expert. Much depends on the nature of the question in regard to which an opinion is asked. While undoubtedly it must appear that the witness has enjoyed some means of special knowledge or experience, no rule can be laid down in the nature of things as to the extent of it."<sup>4</sup>

§ 19. **Competency of Experts Whose Knowledge is Derived from Study.**—A witness, otherwise qualified, may express an opinion on a matter pertaining to his special calling or profession, although his knowledge of that particular matter has been de-

<sup>1</sup> See *Hand v. Church*, 39 Hun (N. Y.), 304.

<sup>2</sup> *Clark v. Bruce*, 12 Hun (N. Y.), 271, 276.

<sup>3</sup> *Baltimore, etc. R. R. Co. v. Leonhardt*, 66 Md. 77, 78.

<sup>4</sup> *Monongahela Water Co. v. Stewartson*, 96 Pa. St. 436, 439.



rived from study rather than from actual experience. It is the doctrine of the courts that study of a matter without practical experience in regard to it may qualify a witness as an expert.<sup>1</sup> But a witness cannot testify as an expert on a particular matter when that particular matter does not pertain to his special calling or profession, and his knowledge of the subject of inquiry has been derived from study alone. It would be most unwise to recognize the principle that a person might qualify himself to testify as an expert in a particular case, merely by devoting himself to a study of the authorities for the purpose of giving such testimony, when such reading and study is not in the line of his special calling or profession. A lawyer would not be competent to express an opinion on a question of medical science, from information which he might acquire from reading medical authorities bearing on such question. Neither would a physician be qualified to express an opinion on a question of foreign law, from information which he might acquire by an examination of legal authorities. While the opinion of either would not be inadmissible on a question lying within the domain of their particular department of science, merely because such opinion was based on information acquired from books. In the English case of *Collier v. Simpson*,<sup>2</sup> Mr. Chief Justice Tindal laid down the doctrine, that an expert could be asked whether in the course of his reading he had found so and so laid down, and that his judgment and the grounds of it could be founded in some degree on books as a

<sup>1</sup> *City of Fort Wayne v. Combs*, 107 Ind. 75, 87; *Howard v. Great Western, etc. Co.*, 109 Mass. 384; *Swett v. Shumway*, 102 Mass. 365.

<sup>2</sup> 5 Car. & Payne, 73; s. c., 24 Eng. C. L. 219.

part of his general knowledge. And the authority of that case has been recognized and followed in this country.

Thus it has been held that a medical man may state his knowledge of a particular subject in medical science, although such knowledge was not derived from experience or actual observation, but from what he had learned from reading and studying medical authorities.<sup>1</sup>

In a case decided in the Supreme Court of Georgia, an expert, who was a civil engineer, stated the rules for the construction of cuts and embankments as such rules are found in standard works on engineering, and added: "I give these rules solely from what I recollect of the books. These rules are found in Mahan, Gillespie and Gilmore, and many others." The court held that "the expert was competent to testify. Every expert derives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources."<sup>2</sup>

In the same way a teacher of natural sciences, who in the teaching of that science had had occasion to investigate the gases produced by the combustion of hard coal, was held competent to testify as to the effect upon a human being of breathing poisonous gases, although his knowledge had not been gained by actual experience and observation.<sup>3</sup>

<sup>1</sup> *State v. Wood*, 53 N. H. 484; *State v. Terrill*, 12 Rich. (N. C.) 321; *Melvin v. Easley*, 1 Jones (N. C.) Law, 388.

<sup>2</sup> *Central R. R. Co. v. Mitchell*, 63 Ga. 173; s. c., 1 Am. & Eng. R. R. Cases, 145.

<sup>3</sup> *Citizens' Gas Light, etc. Co. v. O'Brien*, 19 Brad. (Ill.) 231, 233.

On the other hand, as we have said, study alone does not qualify one to express an opinion on a subject not pertaining to the special calling or profession to which the witness belongs. Thus, where the question was whether the editor of a stock journal who had read extensively on the subject of "foot-rot" could testify as an expert in relation to that disease, it was held that he could not. The subject of the competency of experts, whose knowledge was derived from study only, was discussed with such force and clearness as to warrant its repetition in the note below.<sup>1</sup> In the same way it has

<sup>1</sup> In *Dole v. Johnson*, 50 N. H. 452, a Mr. Waite, editor of a stock journal, who had read extensively on the subject of "foot-rot," but who was without practical experience as to the treatment of the disease, had been called as an expert on the question whether the "foot-rot" is ever a spontaneous disease, or is bred only by contact. Mr. Justice Foster, speaking for the court, said: "Mr. Waite had no *skill* whatever, 'no practical experience in the treatment of sheep for any disease;' that he must then have had *special* and *peculiar* knowledge; that he must have been *really* a man of science, in order to be qualified to give an opinion, would seem to be a settled and definite rule of law. The extent of Mr. Waite's qualification is thus described: 'As editor of a stock journal, he had read extensively on the subject of foot-rot.' The object of all testimony in courts is to place before the jury a knowledge of *facts* pertaining to the case under consideration, and it is a serious departure from this purpose ever to admit, instead of actual knowledge, mere opinion, however correct it may probably be, and therefore opinion, if admitted at all, should be as nearly approximated as possible to the actual knowledge of fact for which it is substituted; and it should always be required of an expert, that he should, at least, be sufficiently acquainted with the subject-matter of his testimony to *know* what its laws are, and not merely to conjecture or to have an idea about it. That is, he should be *really* a man of science. The science (especially in the absence of *skill*), which an expert should be required to possess and employ on a given subject, implies that special and peculiar knowledge acquired only by a course of observation and study, and the expenditure of time, labor and preparation, in a particular employment and calling of life. The matter of our present consideration is of vast importance. \* \* \*

"We admit the wisdom of the rule which, permitting a man of genuine science to give as his opinion the results of study and research into



been held that a lawyer who had read extensively on the subject, and who had listened to the testimony of experts in court, was not competent to give

books of acknowledged authority, yet will not allow such books to be read in court to the jury. The rule is founded partly in the delay which would thus be occasioned to the business of courts, and partly in the idea that it is safer, on the whole, to trust to the judgment of learned men, acquired by study, observation and skill, than to the imperfect deductions of jurors, hastily derived from readings not familiar to them, unassisted by study, examination and comparison of kindred subjects (though we must confess that, in a particular case, we may have little doubt that a page from Youatt or Morrell would be a safer guide for the jury than the opinion of such a witness as Mr. Waite). But so long as the opinions of the most distinguished and most learned authors in the world, expressed through the direct and pure *media* of their celebrated works, are thus excluded from the jury, surely it can be neither wise nor prudent to admit opinions unsustained by the slightest experience or even observation, the deductions of readings at best scanty and superficial, because not pertaining to the *special study and business* of the reader. \* \* \*

"Of course it must be admitted that the testimony of knowledge and opinion, obtained from mere reading, without *study*, reflection or observation, is no more than a relation by the witness of that which the policy of the law excludes, namely, the books themselves which the witness has read.

"The limit of safety in this direction is reached, it would seem, when we admit, as the practice in this State is, the opinions of medical men, for instance, with regard to a disease which in actual practice they may not have treated, but concerning which the science and skill of long experience in the affinities and analogies of the subject have prepared them to speak with confidence, from a knowledge of the rules and laws governing the special subject of inquiry. \* \* \*

"And so the practice in this State permits the skilled practitioner, who has made himself familiar with the science of medicine or surgery by a long course of study and practical experience with kindred subjects, to testify as an expert; and common sense demands that such a man shall have respect given to his opinion, though he may have had no practical experience in a particular case.

"But how is it in the case of this witness? He was not a veterinarian, nor any other kind of a physician or surgeon. 'He had had no practical experience in the treatment of sheep,' nor of any person or thing 'for *any* disease.' He was the editor of a newspaper, devoted, not to the special consideration of this, nor even of kindred subjects, but embracing the very large class of matters ordinarily included in a stock journal. His newspaper was, probably, the ordinary collection of

his opinion as to the symptoms and causes of Texas fever as affecting cattle."<sup>1</sup>

On the subject of opinions based on study, the following excerpt from an opinion pronounced by Mr. Justice Campbell is of interest, and therefore given at length. He says: "No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no busi-

miscellaneous literature and news items, concerning all the diverse matters embraced within the range of such a production, its editor having and making no pretension to veterinary skill and practice.

"It being evident, too, that in the line of his comprehensive reading and study the subject of the diseases of animals was by no means a specialty, the element of editorship has in reality nothing to do with the party's qualifications. 'As an editor,' it is said 'he had read extensively on the subject of foot-rot.' So, as a lawyer, prosecuting or defending a man charged with murder, I, who am not a doctor, may have read extensively on the subject of the effects of strychnine and its manifestations after death, and, as the result of my reading, I might well form the opinion that enough of strychnine might be administered to cause death, without a possibility that a medical man or chemist could be able to detect it in the stomach or blood of the deceased; but, it is to be hoped, my opinion upon this subject would not be allowed. And, as a lawyer, also, in the examination of this case, I have, in fact, read extensively on the subject of foot-rot, the books of Morrell, Youatt and Clock. \* \* \*

"As the result of *my* reading, I should, perhaps, be inclined to believe the disease is *not* contagious, but my opinion is no more admissible than the books themselves of these authors. They are men of acknowledged science and skill. The witness in this case can have examined no better authority. Why should his opinion, without practical skill and experience, be received, and theirs rejected?

"In view of all these considerations, and of the evidence reported by the case submitted to us, we are strongly of the opinion that the witness, having confessedly no veterinary skill nor practice, having also no professional education, not being in any true sense a man of science, because not instructed and prepared by a long course of habit of study concerning the diseases of domestic animals, did not possess the legal qualifications of an expert."

<sup>1</sup> Missouri, etc. R. R. Co. v. Finley, 38 Kan. 550, 560.

ness to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific questions involved matters of definite and intelligent study, and who have by such application made **up** their own minds. In doing so, it is their business to **resort** to such aids of reading and study as they have **reason** to believe contain the information they need. **This** will naturally include the literature of the subject. But if they have only taken trouble enough to find or suppose they find that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinion must be of very moderate value, and whether correct or incorrect, cannot be fortified before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect.”<sup>1</sup>

§ 20. **Competency of Experts Whose Knowledge is Derived from Observation Outside Their Special Calling.**—Mere opportunities for special observation have been held insufficient in some cases to render a witness competent to testify as an expert. For example, a painter by trade who had worked at his calling for twenty years, and who swore that his experience as a painter had enabled him to judge of the quality and character of carpenter work and material, was held incompetent to testify as an expert respecting the workman-like manner in which the carpenter and joiner work was done upon a house on which he did the painting.<sup>2</sup> So a miller

<sup>1</sup> *People v. Millard*, 53 Mich. 63, 76.

<sup>2</sup> *Kilbourne v. Jennings*, 38 Iowa, 533. “A painter, in virtue of the special knowledge and skill acquired in his employment of painting,”



was held not a competent witness to give an opinion as to the skillfulness of work done on a mill, that the construction of its machinery was improper, although a millwright would be a competent witness in such an inquiry.<sup>1</sup> And where the investigation relates to the quality of iron, it was held that the witness must show himself to be skilled in the business of manufacturing iron, and that "a clerk or book-keeper, although he might have been long employed in an iron foundry, and might have seen the business, was not competent to testify as an expert, unless he could show by his testimony that he had given the subject of examining and testing iron special attention and study, and had experience in that art. If he relied upon the decision of others, or upon the marks on the iron, he was not an expert."<sup>2</sup>

But in a case in New York, a person who had been a carpenter and house joiner by trade for twenty-two years, and had worked some on stone buildings, some on brick and some on cobble-stone, but mostly on wooden buildings, was held compe-

said the court, "could learn nothing of the proper mode of framing together materials for the construction of a building. Whatever knowledge he acquires respecting carpenter and joiner work, must be gained from mere observation and attention. But any observant man, whose attention has been specially directed to buildings in process of erection and erected, could have equal means of knowledge, and could be equally qualified to give an opinion. But the opinion of a witness is not to be received merely because he has had some experience, or greater opportunity of observation than others, unless the experience relates to matters of skill and science. It is true the witness in question could tell whether a joint was a close or an open one. And any observant person, without special instruction or skill, could do as much. But it is apparent that, to admit as an expert every person who had availed himself of an opportunity to observe a structure, and who had acquired a knowledge as to the closeness of the joints, would overturn entirely the rule respecting expert testimony."

<sup>1</sup> Walker v. Fields, 28 Ga. 237.

<sup>2</sup> Pope v. Filley, 9 Fed. Rep. 65, 66.

tent to express an opinion whether a wall was worth covering. The court thought he was as competent to express such an opinion as a mason would have been.<sup>1</sup>

§ 21. **Upon what the Competency of the Expert Rests.**—The right of a witness to give expert testimony depends, therefore, upon either the actual experience of the witness with respect to the subject under investigation, or his previous study and scientific research concerning the same, and sometimes on both combined.<sup>2</sup> Certainly, one who has neither made a special study of the subject on which his opinion is desired, nor had any experience in relation to the same, cannot be allowed to give expert testimony concerning it, although the subject under investigation relates to science and the witness is a scientific man.<sup>3</sup> Of course, no exact test can be laid down by which one can determine with mathematical precision how much skill or experience a witness must possess to qualify him to testify as an expert.<sup>4</sup> That question rests within the fair discretion of the court whose duty it is to decide whether the experience or study of the witness has been such as to make his opinions of any value.<sup>5</sup> The witness should have at least a general knowledge of the matter about which he is called to testify,<sup>6</sup> but it is by no means necessary that he should possess the highest degree of skill to qualify him to testify as an expert.<sup>7</sup>

<sup>1</sup> Pullman v. Corning, 9 N. Y. 93.

<sup>2</sup> Citizens' Gas Light Co. v. O'Brien, 118 Ill. 174, 181.

<sup>3</sup> See Citizens' Gas Light Co. v. O'Brien, 15 Brad. (Ill.) 400.

<sup>4</sup> Forgery v. First National Bank, 66 Ind. 123, 125.

<sup>5</sup> McEwen v. Bigelow, 40 Mich. 215, 217.

<sup>6</sup> Heacock v. The State, 13 Texas Ct. of App. 97, 132.

<sup>7</sup> Yates v. Yates, 76 N. C. 142, 149; Hyde v. Woolfolk, 1 Iowa, 159, 166; State v. Hinkle, 6 Iowa, 159, 166.

§ 22. **The Competency of the Witness as a Subject of Review in an Appellate Court.**—It being a question of fact to be decided by the trial judge whether a witness offered as an expert has the qualifications necessary to entitle him to testify in that capacity, the question arises whether the decision of the matter by the trial court can be reviewed in an appellate court. The courts in some instances appear to have laid down the principle unqualifiedly, that the question whether a witness possesses the necessary qualifications of an expert is a question of fact purely within the province and discretion of the trial judge, and that his decision concerning the matter is not subject to revision in the appellate court.<sup>1</sup> But there is not a harmony of opinion on the subject. The Supreme Court of Indiana say: "Some of the cases go very far upon this point, for some of them hold that the decision of the trial court is conclusive, but we think the cases which hold that where there is no evidence at all tending to prove that the witness is qualified to testify as an expert, or where there is a palpable abuse of discretion, the ruling of the trial court is subject to review, are supported by the better reason."<sup>2</sup> In this expression of opinion we emphatically concur. In the Supreme Court of Maine, it is said: "Whether this witness was qualified to testify as an expert, was a question of fact for the presiding judge, and his decision of such a question is usually final. In extreme cases, where a serious mistake has been

<sup>1</sup> *Dole v. Johnson*, 50 N. H. 452, 459; *Jones v. Tucker*, 41 N. H. 546; *Hammond v. Schiff*, 100 N. C. 161; *State v. Cole*, 94 N. C. 958, 964; *Flynt v. Boldenhamer*, 80 N. C. 205; *Wright v. William's Estate*, 47 Vt. 222, 232.

<sup>2</sup> *City of Fort Wayne v. Coombs*, 107 Ind. 75, 85.



committed through some accident, inadvertence, or misconception, his action may be reviewed.”<sup>1</sup> And in Massachusetts it has been declared that the decision of this question by the trial court is conclusive “unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law.”<sup>2</sup> In the Supreme Court of the United States, the decision of the trial judge is said to be conclusive “unless clearly shown to be erroneous in matter of law.”<sup>3</sup> The Supreme Court of Vermont while declaring that the question of competency is a question of fact, the decision of which by the trial court “as an inference from evidence is not revisable,” add: “An arbitrary ruling without evidence or against conclusive showing would leave the question of revisability the same as it would stand on similar rulings on other questions of fact.”<sup>4</sup> In the Supreme Court of Pennsylvania it is said that the matter rests “very much in the sound discretion of the court, and we never reverse in such cases unless the discretion has been grossly abused.”<sup>5</sup> There are other States in which appellate courts will review the trial court’s decision.<sup>6</sup>

<sup>1</sup> *Fayette v. Chesterville*, 77 Me. 28, 33 (1885). And see *Higgins v. Downs*, 75 Me. 346, 347 (1883).

<sup>2</sup> *Perkins v. Stickney*, 132 Mass. 217, 218 (1882), citing *Nunes v. Perry*, 113 Mass. 274, 276, and *Commonwealth v. Sturtivant*, 117 Mass. 122. And see *Lowell v. County Commissioners*, 146 Mass. 403.

<sup>3</sup> *Stillwell Mfg. Co. v. Phelps*, 130 U. S. 520, 527.

<sup>4</sup> *Bemis v. Railroad Co.*, 58 Vt. 636, 641 (1886). And see *Wright v. Williams’ Estate*, 47 Vt. 222, 233.

<sup>5</sup> *Allen’s Appeal*, 99 Pa. St. 196, 202 (1881). See also *Sorg v. First German Congregation*, 63 Pa. St. 156.

<sup>6</sup> See *Citizens’ Gas Light Co. v. O’Brien*, 15 Brad. (Ill.) 400, 411; *Heacock v. The State*, 13 Texas Ct. of App. 97, 132. In *State v. Cob*, 63 Iowa, 695, 699, the court say: “This matter of passing upon expert qualifications is not one that is subject to very well defined rules. There must, of course, be some evidence of the existence of the qualifications;

It is evident that it is only in cases where the trial court has been clearly in the wrong in passing on the qualifications of a witness that a case will be reversed for a ruling admitting one to testify as an expert, or declining to receive his testimony as such. The trial court has the witness before it and has an opportunity of estimating his mental caliber which the appellate court does not enjoy, and a personal examination of the witness ordinarily affords the most satisfactory method of determining his ability or disability to testify in the character of an expert.<sup>1</sup> It is said that if the witnesses offered had any claim to the character of experts the appellate court will not reverse on the ground that the experience of the witnesses was not sufficiently special.<sup>2</sup>

Assuming that an appellate court has the power to review in a proper case the decision by the trial court of this question of competency it will not reverse the ruling of that court unless such ruling was against the evidence, or wholly or mainly without support in the facts which appear.<sup>3</sup> In the absence of a contrary statement in the bill of exceptions, the presumption would be that the trial court was satisfied after proper inquiry as to the competency of the witness, and the mere statement that an objection was made to the witness on the ground that he had not been shown qualified to testify as an

but beyond that it must be left somewhat in the discretion of the court. In a criminal case of the gravity of this one, the discretion must, to be sure, be exercised cautiously; and if the appellate court should be satisfied that it had not been done, and should apprehend that the defendant had suffered injustice, it would doubtless be justified in reversing." And see *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338.

<sup>1</sup> *Broquet v. Tripp*, 36 Kan. 700.

<sup>2</sup> *Delaware, etc. Steam Towboat Co. v. Starrs*, 69 Pa. St. 36.

<sup>3</sup> *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 62, (1888).

expert, would not be sufficient to rebut such a presumption.<sup>1</sup> It must be borne in mind that a party seeking to have the decision of the trial court reviewed should show in his bill of exceptions, or in some proper manner, that no examination was made to test the qualification of the witness, or if made should set forth the evidence that the want of qualification may affirmatively appear,<sup>2</sup> and the entire evidence upon that point should be incorporated in the bill of exceptions.<sup>3</sup> An appellate court cannot say that it was error to exclude the opinion of a witness offered as an expert, when the exceptions fail to show that the trial court decided as a preliminary question that the witness was qualified as an expert.<sup>4</sup> If an exception is taken to the exclusion of testimony which could only come from an expert it should affirmatively appear that the person who was asked for the opinion was an expert.<sup>5</sup> An objection to the decision of the trial court on the question of the competency of the witness must have been taken at the time of the trial, as it cannot be raised in the first instance in the court above.<sup>6</sup>

§ 23. **How the Objection to the Competency of the Witness Should be Taken.**—When the opinion of a witness is called for before his qualifications to testify as an expert have been shown, counsel, unless they are willing to waive the question of the com-

<sup>1</sup> *Hardin v. Sparks*, 70 Texas, 429, (1888).

<sup>2</sup> *Hardin v. Sparks*, 70 Texas, 429, (1888); *Campbell v. Russell*, 139 Mass. 278, (1885).

<sup>3</sup> *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, 335; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250, 258; *Marcy v. Barnes*, 16 Gray, 161; *Sarle v. Arnold*, 7 R. I. 586.

<sup>4</sup> *Carpenter v. Corinth*, 58 Vt. 214, (1885).

<sup>5</sup> *Higgins v. Downs*, 75 Me. 346, (1883).

<sup>6</sup> *Hand v. Brookline*, 126 Mass. 324.



petency of the witness or to take their chance of showing a want of competency on the cross-examination, should state the specific ground of their objection to the testimony of the witness, and not content themselves with a mere general objection. A general objection is of no avail in such a case, and cannot be considered as applying to the competency of a witness to give expert testimony.<sup>1</sup> A general objection failing to specify that no proper foundation has been laid for the admission of evidence otherwise competent is not available as a ground of error.<sup>2</sup>

§ 24. **Competency as Dependent on Whether the Expert has Heard the Testimony.**—An expert either states general facts, which are the results of scientific knowledge or general skill, or else he testifies to opinions.<sup>3</sup> If he testifies to opinions, his testimony is founded either on personal knowledge of the facts, or else it is based on facts shown by the testimony of others.<sup>4</sup> If his opinion is desired on facts testified to by other witnesses, it should appear that he has reliable information or knowledge of what those facts are.<sup>5</sup> But even in such cases it is not always necessary that the witness should have been present, and heard *all* the evidence.<sup>6</sup>

It is sufficient if it appears that he has heard all the testimony which is material to the subject of

<sup>1</sup> See *Stevens v. Brennan*, 79 N. Y. 255, 259; *Amadon v. Ingersoll*, 34 Hun (N. Y.), 134; *Schwander v. Birge*, 46 Hun (N. Y.), 66, 68; *Case v. Perew*, 46 Hun (N. Y.), 57, 62.

<sup>2</sup> *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 72, 80.

<sup>3</sup> *Emerson v. Lowell Gas Light Co.*, 6 Allen, 146.

<sup>4</sup> *Spear v. Richardson*, 37 N. H. 23, 34; *Livingston v. Commonwealth*, 14 Gratt. (Va.) 592; *Walker v. Fields*, 28 Ga. 237.

<sup>5</sup> *Heald v. Thing*, 45 Me. 392; *Lake v. People*, 12 N. Y. 358; s. c., 1 Parker Cr. Cas. 495; *People v. Thurston*, 2 Parker Cr. Cas. 49.

<sup>6</sup> *Miller v. Smith*, 112 Mass. 470, 475.

inquiry.<sup>1</sup> And he should have heard the evidence as actually given, and not as it appears on the minutes of the testimony as taken by counsel. When an expert had not heard the evidence as given on the trial, and counsel offered to read to him their minutes of the testimony, it was held that this could not be allowed.<sup>2</sup> Of course, the necessity for the witness to have heard the testimony does not exist if the *whole* of the evidence is embraced in a hypothetical question submitted to him.<sup>3</sup>

§ 25. **Competency of Experts in Particular Cases.**

—We have thus confined our attention to the general principles relating to the competency of experts, and have left the consideration of the competency of experts in particular cases to be considered in subsequent chapters. For instance, the competency of physicians and surgeons to testify as experts, is considered in the chapter relating to expert testimony in medicine, surgery and chemistry, and the qualifications of experts in handwriting in the chapter relating to expert testimony in handwriting.

<sup>1</sup> *Carpenter v. Blake*, 2 Lans. (N. Y.) 206; *State v. Medicott*, 9 Kan. 289; *Rich v. Jones*, 9 Cush. (Mass.) 337; *Hand v. Brookline*, 126 Mass. 324; *Davis v. State*, 38 Md. 15, 40; *State v. Hayden*, 51 Vt. 296.

<sup>2</sup> *Thayer v. Davis*, 38 Vt. 163.

<sup>3</sup> See *Webb v. State*, 9 Texas Ct. of App. 490

## CHAPTER III.

## THE EXAMINATION OF EXPERT WITNESSES.

## SECTION.

26. Mode of Examination of Expert Witnesses.
27. The Hypothetical Question.
28. The Form of the Hypothetical Question.
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30. The Hypothetical Question is not to be Based on the Opinions of Other Experts.
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37. Other Matters Pertaining to the Examination and Cross-Examination of Experts.
38. General Rules Governing the Examination of Witnesses.
39. Excluding Experts from the Court Room During the Examination of Witnesses.
40. Right of Court to Limit the Number of Expert Witnesses.
41. By Whom Expert Witnesses are Selected.

## § 26. Mode of Examination of Expert Witnesses.

—It being determined by the court, that the subject-matter of inquiry is one upon which the opinion of experts may properly be received in evidence, and that the witness introduced possesses special skill, in the subject-matter of inquiry, the examination of the witness is next in order, and it becomes



important that such examination should proceed strictly in accordance with the rules which it has been found necessary to establish in relation to the admission of expert testimony. It is necessary in the examination of all such witnesses, that questions should be so framed as not to call on the witness for a critical review of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of fact from the testimony, or to pass on the credibility of the witnesses,<sup>1</sup> the general rule being that an expert should not be asked a question in such a manner as to cover the very question to be submitted to the jury.<sup>2</sup> As expressed in one of the opinions, "a question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them."<sup>3</sup>

<sup>1</sup> Jameson v. Drinkald, 12 Moore, 148; Guiterman v. Liverpool, etc. Steamship Co., 83 N. Y. 358, 366; United States v. McGloin, 1 Curtis C. C. 1, 9; Buxton v. Somerset Potters Works, 121 Mass. 446; Reynolds v. Robinson, 64 N. Y. 589; Phillips v. Starr, 26 Iowa, 351; Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 179; Dexter v. Hall, 15 Wall. 9; Cincinnati, etc. Mutual Ins. Co. v. May, 20 Ohio, 211, 224; Rush v. Megee, 36 Ind. 1; Elliott v. Russell, 92 Ind. 526. "Le Medicin ne doit jamais donner un avis sur le difficile meme, que les juris ont a resoudre; par exemple, sur le point de savoir si l'accuse est irresponsable, mais simplement faire connaitre son opinion sur l'existence ou le degre d'influence de certain faits." Dr. Mittermaier's Traite de la Procedure Criminelle.

<sup>2</sup> Chicago & Alton R. R. Co. v. Springfield & Northwestern R. R. Co., 67 Ill. 142; Tingley v. Cowgill, 48 Mo. 294; Muldowney v. Illinois Central R. R. Co., 39 Iowa, 615; Pelamourges v. Clark, 9 Iowa, 1, 16; Hill v. Portland, etc. R. R. Co., 55 Me. 444; Keller v. N. Y. Central R. R. Co., 2 Abbott's App. Decis. (N. Y.) 480, 490; Clark v. Detroit Locomotive Works, 32 Mich. 348; State v. Cole, 94 N. C. 958; Baltimore, etc. Turnpike Co. v. Cassell, 66 Md. 419; Henry v. Hall, 13 Ill. App. 343; Smith v. Hickenbottom, 57 Iowa, 733; Boor v. Lowrey, 103 Ind. 480.

<sup>3</sup> Dolz v. Morris, 17 N. Y. Sup. Ct. 202.

And the language in another case is as follows: "The questions to him must be so shaped as to give him no occasion to mentally draw his own conclusions from the whole evidence, or a part thereof, and from the conclusion so drawn, express his opinion, or to decide as to the weight of evidence or the credibility of witnesses; and his answers must be such as not to involve any such conclusions so drawn, or any opinion of the expert, as to the weight of the evidence or the credibility of the witnesses."<sup>1</sup> "The object of all questions to experts," says the Supreme Court of Massachusetts, "should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded."<sup>2</sup> It is not the duty of an expert to reconcile conflicting evidence.<sup>3</sup> In illustration of this principle, that an expert cannot be asked an opinion which requires him to pass upon the evidence, the following question may be cited as having been held to be an improper one, for the reason that it practically put the expert in the place of the jury: "From the facts and circumstances stated by previous witnesses, and from those testified to by still other witnesses, relating to the homicide, and from defendant's conduct on the trial, is it your opinion that the defendant

<sup>1</sup> *McMechen v. McMechen*, 17 W. Va. 683, 694; *Kerr v. Lunsford*, 31 W. Va. 659, 672.

<sup>2</sup> *Hunt v. Lowell Gas Light Co.*, 8 Gray, 169.

<sup>3</sup> *Luning v. State*, 1 Chandler (Wis.), 178.

was sane or insane when he committed the act?"<sup>1</sup> And so where the question asked was: "What is your opinion based upon the testimony adduced at this trial, as to the sanity or insanity of the defendant at or before the time of the alleged shooting?"<sup>2</sup> The truth of the testimony not being admitted, the question asked involved the determination of the truth of that testimony by the expert. It was therefore improper. For the same reason an engineer has not been allowed to answer the question whether "the plaintiff in oiling that pulley could have been injured unless he was careless."<sup>3</sup> So it has been held improper to ask: "In your opinion as a canal boatman, did Mr. C. in any way omit or neglect to do anything which he might have done to save his boat?" He could be asked whether certain acts assumed to be proven were seaman-like and proper, but he could not be allowed to express an opinion as to what was or was not done as a matter of fact.<sup>4</sup> And in an action against a physician for neglect and non-attendance in a case of frost bite, it has been held that a medical witness, to whom the evidence was read, could not be asked: "From the evidence before the court, to what do you ascribe the loss of the plaintiff's fingers and toes?"<sup>5</sup> A further illustration may be found in the case cited below.<sup>6</sup>

<sup>1</sup> *State v. Felter*, 25 Iowa, 67, 74.

<sup>2</sup> *Reed v. The State*, 62 Miss. 405; and so in *Bennett v. State*, 57 Wis. 69.

<sup>3</sup> *Buxton v. Somerset Potters Works*, 124 Mass. 446.

<sup>4</sup> *Carpenter v. Eastern Transportation Co.*, 71 N. Y. 574.

<sup>5</sup> *Key v. Thompson*, 2 Hannay (N. B.), 224.

<sup>6</sup> In *State v. Bowman*, 78 N. C. 509, 511, the following was the form of examination: "Have you heard the statements of the witness as to the circumstances immediately preceding her being taken sick, the



§ 27. **The Hypothetical Question.**—As an expert is not allowed to draw inferences or conclusions of fact from the evidence, his opinion should be asked upon a hypothetical statement of facts.<sup>1</sup> Mr. Chief Justice SHAW well stated the law as follows: “In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued: either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain

appearance of the body immediately after death, its appearance subsequent and before interment, the condition of her limbs and members, the account given by the accused of her manner of death, her asking to have her feet uncrossed, and the manner in which she gripped him and her child, and have you heard the testimony of Mr. Redd as to his analysis and its results, and from them can you as a physician form an opinion as to this cause of her death?”

“The witness answered ‘Yes.’”

“In giving answer, do you exclude from your consideration the evidence of other circumstances in the nature of moral evidence in the case?”

“The witness answered ‘I do.’”

“What in your opinion was the cause of her death?”

“The witness answered, ‘I believe it was strychnine.’”

The supreme court held that this evidence should not have been received, as it put the expert in the place of the jury, and required him to pass on the evidence.

<sup>1</sup> Strong v. Kean, 13 Irish Law R. 93; Polk v. State, 36 Ark. 117, 124, 125; Spear v. Richardson, 37 N. H. 23; Teft v. Wilcox, 6 Kan. 46; Pidcock v. Potter, 68 Pa. St. 342; Woodbury v. Obear, 7 Gray (Mass.), 467; Williams v. Brown, 28 Ohio St. 547, 551; Moore v. State, 17 Ohio St. 526; Jerry v. Townshend, 9 Md. 145; Baltimore & Ohio Railroad Co. v. Thompson, 10 Md. 76; Walker v. Rogers, 24 Md. 237; Page v. State, 61 Ala. 16; Willey v. Portsmouth, 35 N. H. 303; Bishop v. Spining, 38 Ind. 143; Dexter v. Hall, 15 Wall. 9; Ayers v. Water Commissioners, 29 N. Y. Sup. Ct. 297; Guiterman v. Liverpool, etc. Steamship Co., 83 N. Y. 358, 366; Hunt v. State, 9 Tex. Ct. of App. 166; Hoard v. Peck, 56 Barb. (N. Y.) 202; City of Decatur v. Fisher, 63 Ill. 241; Phillips v. Starr, 26 Iowa, 349.

facts testified of are true he can form an opinion, and what that opinion is.”<sup>1</sup>

Counsel, in framing the hypothetical question, may base it upon the hypothesis of the truth of all the evidence, or on an hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry.<sup>2</sup> The question is not improper simply because it includes only a part of the facts in evidence.<sup>3</sup> And if framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist.<sup>4</sup>

“The claim is,” says Chief Justice FOLGER, “that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice.”<sup>5</sup> It is, therefore, the privilege of counsel to assume any state of facts which

<sup>1</sup> *Dickenson v. Fitchburg*, 13 Gray (Mass.), 546, 556.

<sup>2</sup> *Gotlieb v. Hartman*, 3 Colo. 53; *Williams v. State*, 64 Md. 384.

<sup>3</sup> *Stearns v. Field*, 90 N. Y. 640; *Turnbull v. Richardson*, 69 Mich. 413.

<sup>4</sup> *Cowley v. People*, 83 N. Y. 464; *Dillebar v. Home Life Ins. Co.*, 87 N. Y. 79; *Lovelady v. State*, 14 Tex. Ct. of App. 345; *Quinn v. Higgins*, 63 Wis. 664; *Kerr v. Lunsford*, 31 W. Va. 660.

<sup>5</sup> *Cowley v. People*, 83 N. Y. 464. And see to the same effect *Davis*

there is any evidence tending to prove, and to have the opinion of the expert based on the facts assumed.<sup>1</sup> The fact that counsel make an error in their assumption, does not render the question objectionable, if it is within the possible or probable range of the evidence.<sup>2</sup> But the testimony should tend to establish the facts embraced in the question.<sup>3</sup> A court, however, has no right to reject a question which counsel claims embraces facts which the evidence tends to prove, simply because in its opinion the facts assumed are not established by a preponderance of the evidence. The question should be allowed if there is any evidence tending to prove the facts assumed. For what facts are proved in a case, when there is any evidence tending to prove them, is a matter for the jury and not for the court.<sup>4</sup> But if the hypothetical question is clearly exagger-

*v. State*, 35 Ind. 496; *Guetig v. State*, 66 Ind. 94; *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42; *Carpenter v. Blake*, 2 Lans. (N. Y.) 206.

<sup>1</sup> *Peterson v. Chicago, etc. R. R. Co.*, 38 Minn. 511; *Stearns v. Field*, 90 N. Y. 640; *Quinn v. Higgins*, 63 Wis. 664; *Leache v. State*, 22 Tex. Ct. of App. 279; *Louisville, etc. R. R. Co. v. Falvey*, 104 Ind. 409, 412; *Goodwin v. The State*, 96 Ind. 550, 555; *Conway v. The State*, 118 Ind. 490; *Kerr v. Lunsford*, 31 W. Va. 659, 672; *People v. Goldenson*, 76 Cal. 328.

<sup>2</sup> *Harnett v. Garvey*, 66 N. Y. 641; *Nave v. Tucker*, 70 Ind. 15; *Stearns v. Field*, 90 N. Y. 640.

<sup>3</sup> *Bomgardner v. Andrews*, 55 Iowa, 638; *Hathaway's Admr. v. National Life Ins. Co.*, 48 Vt. 335; *Hurst v. The C. R. I. & P. R. Co.*, 49 Iowa, 76; *Gueting v. State*, 66 Ind. 94; *Daniells v. Aldrich*, 42 Mich. 58; *Dillebar v. Home Life Ins. Co.*, 87 N. Y. 79; *State v. Cross*, 68 Iowa, 180; *In re Will of Norman*, 72 Iowa, 84; *Ballard v. Nebraska*, 19 Neb. 609; *State v. Hanley*, 34 Minn. 430; *People v. Angsbury*, 97 N. Y. 501; *State v. Anderson*, 10 Oreg. 448; *Meeker v. Meeker*, 74 Iowa, 352; *Woolner v. Spalding*, 65 Miss. 204; *Bomgardner v. Andrews*, 55 Ind. 638; *Bathrick v. Detroit Post and Tribune Co.*, 50 Mich. 643; *People v. Millard*, 53 Mich. 64; *O'Hara v. Wells*, 14 Neb. 403; *Morrill v. Tegarden*, 19 Neb. 534; *In re Will of Ames*, 51 Iowa, 596.

<sup>4</sup> *Quinn v. Higgins*, 63 Wis. 664; *Louisville, etc. R. R. Co. v. Falvey* 104 Ind. 409, 413.



ated and unwarranted by any testimony in the case, an objection to it will be sustained.<sup>1</sup> To allow on the direct examination an hypothetical question to be put which assumes a state of facts not warranted by the testimony is error,<sup>2</sup> and counsel will never be permitted on the direct examination to embrace in an hypothetical question anything which the testimony does not either prove or tend to prove.<sup>3</sup> For instance, in a case involving the value to the plaintiff of a contract which the defendant had broken, an hypothetical question to an expert which did not accurately state the terms of the contract would be inadmissible.<sup>4</sup> A question based on an assumption which the evidence neither proves nor tends to prove is misleading. But to lay the foundation for exceptions on the ground that the hypothetical question embraces facts not in evidence, the attention of the trial judge should be called to the specific objection, in order that he may determine, as he must in the first instance, whether there is sufficient evidence tending to prove the facts stated to authorize the question.<sup>5</sup> For the rule is a general one, that objections to testimony should be specifically stated to the trial court, and that only such objections as are so stated can be considered on appeal.<sup>6</sup> When the hypothetical

<sup>1</sup> *Williams v. Brown*, 28 Ohio St. 547, 551, 552; *Muldowney v. Illinois Central R. R. Co.*, 39 Iowa, 615; *Dickie v. Van Bleck*, 5 Redf. (N. Y.) 284, 294; *Haish v. Payson*, 107 Ill. 365, where the hypothetical question covers two pages and a half and was condemned as assuming facts not within the range of legitimate evidence. *Woolner v. Spalding*, 65 Miss. 204.

<sup>2</sup> *Reber v. Henning*, 115 Pa. St. 599; *People v. Hall*, 48 Mich. 482, 489.

<sup>3</sup> *Fraser v. Jennison*, 42 Mich. 206, 227.

<sup>4</sup> *Jewett v. Brooks*, 134 Mass. 505.

<sup>5</sup> *Powers v. Mitchell*, 77 Me. 361.

<sup>6</sup> *Louisville, etc. R. R. Co. v. Falvey*, 104 Ind. 409, 415.

question has been improperly allowed, because not including certain facts which should have been embraced in it, the error is cured if the cross-examination has supplied the omission and placed before the witness all the facts necessary to the formation of an opinion.<sup>1</sup>

We have stated the rule to be that counsel in framing the hypothetical question can assume any state of facts which there is any evidence tending to prove, but that it is error on the direct examination to allow a hypothetical question to be put which assumes a state of facts not warranted by the testimony. We would not, however, be understood as saying that a question should not be allowed which assumes facts which the testimony already in the case neither proves nor tends to prove, provided counsel in putting the question declare that they will by subsequent testimony supply the necessary evidence to warrant the facts so assumed.<sup>2</sup> When this course is pursued if such testimony is not afterwards given it would be the duty of the court to strike out the answer to the question.

§ 28. **The Form of the Hypothetical Question.—**

The doctrine as to the proper form of the hypothetical question, has been set forth by the Supreme Court of Vermont in an opinion, from which we quote as follows: "A study of the various cases will show that the form of the question is modified and shaped by the courts; whether it states facts, or puts facts hypothetically, or refers to the testimony of witnesses as being true, so as to give the witness no occasion or opportunity to decide upon the evi-

<sup>1</sup> Van Hoesen v. Cameron, 54 Mich. 609.

<sup>2</sup> People v. Sessions, 58 Mich. 594, 599; Turnbull v. Richardson, 69 Mich. 400, 413.

dence, or mingle his own opinion of the facts, as shown by the evidence, with the facts upon which he is to express a professional opinion. This is the important point, and to secure this various forms of inquiry have been adopted. Hypothetical questions may be so put as to require the witness to decide upon the evidence, to determine which side preponderates, and to find conclusions from the evidence, in order to reconcile conflicting facts. Such questions, though hypothetical, are as clearly improper as if they directly sought the opinion of the witness on the merits of the case. Hence, in framing such questions, care should be taken not to involve so much, or so many facts in them, that the witness will be obliged in his own mind to settle other disputed facts, in order to give his answer. \* \* In some cases, all the facts bearing on the issue might be summed up in a single question. But when facts on one side conflict with facts on the other, they ought not to be incorporated into one question, but the attention of the witness should be called to their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to state it. Then the jury can know all the facts and grounds on which the opinion is based.”<sup>1</sup> The length of a hypothetical statement made to a witness must be left in a great degree to the court’s discretion, its length necessarily depending on the simple or complicated character of the transactions recited, and the number of particulars which must be considered for the formation of the opinion desired.<sup>2</sup>

<sup>1</sup> Fairchild v. Bascomb, 35 Vt. 415.

<sup>2</sup> Forsythe v. Doolittle, 120 U. S. 73, 78 (1886).



It is important in any case that the jury should distinctly understand what are the exact facts upon which the expert bases his opinion, for the value of that opinion depends upon whether or not it is based on false assumptions or on existing facts. Where the evidence is at all voluminous, and where it is not entirely harmonious, it is improper to permit a question to be put which requires the expert to give an opinion upon his memory of what the evidence was, and upon his conclusions as to what the evidence proved.<sup>1</sup> For this reason it has been held error to permit an expert witness to answer this question: "What, in your opinion, would all the facts as sworn to by the several witnesses, if true, indicate as to the mental condition of the prisoner at the time of the commission of the offense?"<sup>2</sup> The objections to the question are that the witness may understand the evidence to be radically different from what the jurors hearing the testimony understand it, and that it asks for an opinion based on the memory of the witness as to what the evidence was, and upon his conclusions as to what the evidence established. It has, however, been held proper to ask an expert who had heard the evidence of a single witness his opinion "supposing the testimony of the witness to be truthful," it not appearing that there had been anything in the testimony of the witness which was contradictory, or from which different inferences might properly be drawn.<sup>3</sup> And in a case in New York, where

<sup>1</sup> Hagadorn v. Conn. Mut. Life Ins. Co., 22 Hun (N. Y.), 249, 252 (1880).

<sup>2</sup> Bennett v. State, 57 Wis. 69 (1883).

<sup>3</sup> Wright v. Hardy, 22 Wis. 348.

there was a single definite statement by a witness of services performed, the Court of Appeals sustained a question which in substance was: "Assuming that the services rendered were as described by plaintiff, what were they worth?"<sup>1</sup> Even in cases where more than one witness has testified, if there is no conflict in the evidence, and if the testimony is not voluminous, a court may in its discretion allow the counsel to put the question in the above form without any recapitulation of the evidence.<sup>2</sup> But courts should exercise caution in allowing questions to be thus put to the witness. To properly form an opinion the witness should have full information as to the ascertained or supposed state of facts upon which his opinion is based, and ordinarily should not be left to form an opinion on such facts as he can recollect.<sup>3</sup> And the jury to properly estimate his opinion should have the means of knowing exactly on what his opinion is based. The jury should know on what basis of actual evidence on the facts shown by the witnesses who were not experts, the experts themselves testified.<sup>4</sup>

<sup>1</sup> *McCollum v. Seward*, 62 N. Y. 316. See the explanation of this case in *Hagadorn v. Conn. Mut. Life Ins. Co.*, 22 Hun (N. Y.), 249, 252.

<sup>2</sup> *State v. Lautenschlager*, 22 Minn. 521; *Getchell v. Hill*, 21 Minn. 464; *Storer's Will*, 28 Minn. 9 (1881). In a case in North Carolina the following was sustained: "If the jury find the symptoms were as testified to by Dr. Arnold and A. M. Wicker, and the conditions of the body after death, as described by Mrs. Annie McGilvary and Mr. Evander McGilvary" (both of whom had given evidence on the point), "and if the jury should also find that strychnia was found in the stomach of deceased after death, as testified by the chemist, Dr. Hinsdale, can you say what produced the death?" *State v. Cole*, 94 N. C. 958 (1886). And see *Gates v. Fleischer*, 67 Wis. 504.

<sup>3</sup> *Guiterman v. Liverpool, etc. Steamship Co.*, 83 N. Y. 358, 365 (1881); *Hagadorn v. Conn. Mut. Life Ins. Co.*, 22 Hun, 251; *Elliott v. Russell*, 92 Ind. 526, 530 (1883); *Burns v. Barenfield*, 84 Ind. 43, 48 (1882); *Craig v. Noblesville, etc. R. R. Co.*, 98 Ind. 109.

<sup>4</sup> *People v. Millard*, 53 Mich. 63, 75.

§ 29. **The Form of the Hypothetical Question—The Subject Continued.**—It is not always necessary that a hypothetical question should be asked in a formal manner. Where a medical expert had read the deposition of the plaintiff, detailing minutely the injuries and bodily condition claimed to have resulted to him from an injury which he related, it was held proper to ask him “from the knowledge gained by reading the deposition,” his opinion as to the plaintiff’s condition at the time the deposition was made, and as to the cause of that condition. The court said that where an expert heard or read the evidence, there was no reason why he might not form as correct a judgment based upon such evidence, assuming it to be true, as if the same evidence had been submitted to him in the form of hypothetical questions, and that it would be an idle and useless ceremony to require evidence with which he was already familiar to be repeated to him in that form.<sup>1</sup>

We have elsewhere said that it is the privilege of counsel to assume any state of facts which there is any evidence tending to prove, and that the hypothetical question need not embrace all the facts.<sup>2</sup> While this is true in every case where there is a conflict in the evidence, yet some of the cases hold that if there is no dispute as to the facts on which the expert’s opinion is desired, it is proper to require that the question to the expert shall embrace *all* the facts, and that the witness shall take them all into consideration in expressing his opinion.<sup>3</sup> And in a case in Texas, where the

<sup>1</sup> *Gilman v. Town of Strafford*, 50 Vt. 726.

<sup>2</sup> See section 27.

<sup>3</sup> *Davis v. The State*, 35 Ind. 496.



opinion of an expert was asked on the testimony of one of the witnesses, the Court of Appeals declared that an opinion could not be predicated on anything less than the entire testimony, whether actually or hypothetically presented.<sup>1</sup> So it has been said that the advantage of the usual hypothetical question, including the substance of the whole testimony, is so great, that it should only be sacrificed when the circumstances of the case plainly call for it.<sup>2</sup> The hypothesis should be clearly stated, so that the jury may know with certainty upon precisely what state of facts the expert bases his opinion.<sup>3</sup> We give in the note below an illustration of the hypothetical question, the question being the one propounded by the defense to the experts in the trial of Guiteau,<sup>4</sup> that propounded by the prosecution in the same case being of too great length to permit of its reproduction in these pages.

<sup>1</sup> *Webb v. State*, 9 Texas Ct. of App. 490.

<sup>2</sup> *Haggerty v. Brooklyn, etc. R. R. Co.*, 61 N. Y. 624.

<sup>3</sup> *McMechen v. McMechen*, 17 W. Va. 683, 698.

<sup>4</sup> Q. Assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar; also that at about the age of thirty-five years his own mind was so much deranged that he was a fit subject to be sent to an insane asylum; also that at different times after that date, during the next succeeding five years, he manifested such decided symptoms of insanity, without simulation, that many different persons conversing with him, and observing his conduct, believed him to be insane; also that in or about the month of June, 1881, at or about the expiration of said term of five years, he became demented by the idea that he was inspired of God to remove by death the President of the United States; also that he acted on what he believed to be such inspiration, and as he believed to be in accordance with the Divine will in the preparation for, and in the accomplishment of such a purpose; also that he committed the act of shooting the President under what he believed to be a Divine command which he was not at liberty to disobey, and which belief made out a conviction which controlled his conscience and overpowered his will as to that act, so that he could not resist the mental pressure upon him; also that immediately after the shooting he appeared calm and as if relieved by the performance of a

§ 30. **The Hypothetical Question is not to be Based on the Opinions of other Experts.**—It seems that it is not proper in asking hypothetical questions to incorporate in them the opinions of other expert witnesses. An opinion must rest on fact, and cannot rest in whole or in part upon other opinions. This question was recently raised in the Supreme Court of Indiana, and the court laid down the law as above stated. It said: “An opinion of an expert witness cannot be based upon opinions expressed by other experts. Facts, and not opinions, must be assumed in the questions. If it were otherwise, opinions might be built upon opinions of experts and the substantial facts driven out of the case.”<sup>1</sup> And in a case recently decided in Maryland, that court said: “Now, while an expert may give his opinion upon facts assumed to have been established, it would be against every rule and principle of evidence to allow him to state his opinion upon the conclusions and inferences of other witnesses.”<sup>2</sup>

§ 31. **When Questions Need not be Hypothetical.**—There are exceptions to the general rule requiring that on the direct examination the opinions of experts should be asked upon an assumed state of facts.

*First.* A distinction is taken, as already pointed out, between cases in which there is a conflict of evidence upon the material facts and those in which no such conflict exists. In the former class

great duty; also that there was no other adequate motive for the act than the conviction that he was executing the Divine will for the good of his country—assuming all of these propositions to be true, state whether, in your opinion, the prisoner was sane or insane at the time of shooting President Garfield?

<sup>1</sup> Louisville, etc., R. R. Co. v. Falvey, 104 Ind. 409, 421 (1885).

<sup>2</sup> Williams v. The State, 64 Md. 384, 394 (1885).

of cases the question must be framed hypothetically, but in the latter class there is no such necessity.<sup>1</sup>

*Second.* It is not necessary to assume a state of facts in those cases in which the expert is personally acquainted with the material facts in the case.<sup>2</sup>

For instance, a medical witness who has no personal knowledge of the prisoner cannot be asked: "From the facts and circumstances stated by previous witnesses, and from those testified to by still other witnesses, relating to the homicide, and from defendant's conduct on the trial, is it your opinion that the defendant was sane or insane when he committed the act? \* \* \* But if a physician visits a person, and from actual examination or observation becomes acquainted with his mental condition, he may give an opinion respecting such mental condition at that time—that is, he may, under such circumstances, state to the jury his opinion as to the sanity or insanity of the person at the time when he thus observed or examined him."<sup>3</sup> So, where a medical expert had made a personal examination of the uterus of a deceased woman, it was proper to ask him, "What, in your opinion, caused the death of the person from whom

<sup>1</sup> See section 29, and *Cincinnati, etc. Mut. Ins. Co. v. May*, 20 Ohio, 211, 224; *Tefft v. Wilcox*, 6 Kan. 46; *Page v. State*, 61 Ala. 16; *Woodbury v. Obear*, 7 Gray, 467; *Pidcock v. Potter*, 68 Pa. St. 342; *Bishop v. Spining*, 38 Ind. 143; *Guiterman v. Liverpool, etc. Steamship Co.*, 83 N. Y. 358, 366; *State v. Klinger*, 46 Mo. 224; *Carpenter v. Blake*, 2 Lans. (N. Y.) 206; *Coyle v. Commonwealth*, 104 Pa. St. 117; *Henry v. Hall*, 13 Ill. App. 343.

<sup>2</sup> *Bellefontaine, etc. R. R. Co. v. Bailey*, 11 Ohio St. 333, 337; *Transportation Line v. Hope*, 95 U. S. 297, 298; *Brown v. Huffard*, 69 Mo. 305; *Ayres v. Water Commissioners*, 29 N. Y. Sup. Ct. 297; *Bellinger v. N. Y. Cent. R. R. Co.*, 23 N. Y. 42, 46; *Dunham's Appeal*, 27 Conn. 193.

<sup>3</sup> *State v. Felter*, 25 Iowa, 67, 74, 75, per Dillon, C. J.



the uterus was taken?"<sup>1</sup> And an expert having personal knowledge of the facts has been permitted to testify that a machine was constructed in a workman-like manner;<sup>2</sup> that a wall was properly and compactly constructed;<sup>3</sup> that the abutments of a bridge were properly and skillfully placed, and sufficient to discharge water in time of flood;<sup>4</sup> that an article was properly stowed in a vessel.<sup>5</sup>

In relation to this subject we cannot do better than quote from the opinion of Lord Chief Justice TINDAL, delivered in the House of Lords, in the celebrated *NcNaghten* case: "The question lastly proposed by your Lordships is: 'Can a medical man conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?' In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere

<sup>1</sup> *State v. Glass*, 5 Oreg. 73.

<sup>2</sup> *Curtis v. Gano*, 26 N. Y. 426.

<sup>3</sup> *Pullman v. Corning*, 9 N. Y. 93.

<sup>4</sup> *Conhocton Stone Road Co. v. Buffalo, N. Y. & Erie R. R. Co.*, 10 N. Y. 523.

<sup>5</sup> *Price v. Powell*, 3 N. Y. 322.

questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."<sup>1</sup>

It may be remarked as well in this connection as any other, that answers to hypothetical questions are not objectionable because they include considerations not referred to in the questions, as constituting the basis of the opinion given, and such as the testimony tends to prove, and as might properly have been included in the questions.<sup>2</sup>

§ 32. **Instructions to the Jury Concerning Testimony Based on Hypothetical Questions.**—But an hypothetical question may have been asked and answered which it afterwards appears should have been excluded. In such cases, the court should properly instruct the jury concerning the same. The question put to an expert may be objectionable, either because it includes too much or because it includes too little. In either case it would seem proper that the jury should be instructed to disregard the opinion based on it.<sup>3</sup> It is proper to instruct the jury to disregard the opinions of expert witnesses, based on hypothetical statements of fact, in case they find the hypothesis not in accordance with the facts.<sup>4</sup> But the

<sup>1</sup> 10 Cl. & Fin. 200, 211.

<sup>2</sup> *Hathaway's Admr. v. National Life Ins. Co.*, 48 Vt. 335.

<sup>3</sup> *Commonwealth v. Mullins*, 2 Allen (Mass.), 296; *Gueting v. State*, 66 Ind. 94; *Hovey v. Chase*, 52 Me. 304; *People v. Sessions*, 58 Mich. 594, 599.

<sup>4</sup> *Loucks v. Chicago, etc. R. R. Co.*, 31 Minn. 526; *Forsyth v. Doolittle*, 120 U. S. 73, 77 (1886).

court should be careful not to assume the province of the jury and pass on the weight of the testimony, for if there is any evidence tending to prove the facts assumed, it is for the jury to weigh the evidence, and determine whether the supposed facts embraced in the hypothetical question actually correspond with the facts as proved by the evidence.<sup>1</sup> In a case in Indiana, it has been decided that an instruction was substantially correct which informed the jury that the facts stated in an hypothetical case need not necessarily be always fully proven to give value to the testimony of an expert.<sup>2</sup> But in a case in the Supreme Court of Michigan, Mr. Justice MORSE says: "The answer of an expert witness to a hypothetical question must be supposed to rest on all of the facts stated in such question; and, if one of these facts is not found in the case, the jury must discard the answer to the question, under all of the authorities. And the reason of the rule is founded upon principle, and is clearly apparent without argument."<sup>3</sup> So in another case before the same court, the trial court charged the jury that it was important for them just as far as they could, to look into the evidence and determine whether the facts assumed in the hypothetical question actually existed, adding, "because if one fact supposed to be true, included in the question, is untrue, not supported by the evidence, then the opinion of the doctor would be valueless. He gives his opinion upon a certain state of facts supposed to be true,

<sup>1</sup> Boardman v. Woodman, 47 N. H. 120, 135; Lake v. The People, 1 Parker's Cr. Cas. 495; People v. Thurston, 2 Parker's Cr. Cas. 49.

<sup>2</sup> Epps v. The State, 102 Ind. 539.

<sup>3</sup> Turnbull v. Richardson, 69 Mich. 400, 420.



and we don't know what his opinion would be if one of those facts were withdrawn." <sup>1</sup> No fault was found with this in the Supreme Court. And in a case in Wisconsin it is said that if the question fails to assume all the facts essential to the formation of a proper opinion, the effect of the testimony based thereon is much weakened, if not entirely destroyed, and that the court may so instruct the jury. <sup>2</sup>

§ 33. **The Hypothetical Question on the Cross-Examination.**—The general rule has been stated in a preceding section to be, that on the direct examination of an expert witness it is error to include in the hypothetical question an assumed state of facts which the evidence in the case does not prove or tend to prove. <sup>3</sup> But on the cross-examination of the witness counsel are not similarly restricted. On the cross-examination of any witness, whether an ordinary or an expert witness, counsel are entitled to ask any questions which tend to test the accuracy, veracity or credibility of the witness, or which tend to shake the credit of the witness by injuring his character, although the facts concerning which he is questioned may be, as to the main issue, irrelevant and collateral. <sup>4</sup> Consequently, on the cross-examination of a witness testifying as an expert, counsel may be permitted, for the purpose of testing the skill and accuracy of the witness, to ask him hypothetical questions pertinent to the inquiry whether the facts assumed in such questions have been testified to by witnesses or not. <sup>5</sup> To test the

<sup>1</sup> *People v. Foley*, 64 Mich. 148, 156.

<sup>2</sup> *Quinn v. Higgins*, 63 Wis. 664.

<sup>3</sup> See section 27.

<sup>4</sup> See *Stephen's Digest of the Law of Evidence*, Art. 129.

<sup>5</sup> *Dillebar v. Home Life Ins. Co.*, 87 N. Y. 79.

knowledge and competency of the witness, counsel may ask purely imaginary or abstract questions, assuming facts or theories having no foundation in the evidence.<sup>1</sup> The allowance of all such questions rests in the sound discretion of the court, and where that discretion is fairly exercised the appellate court will not interfere.<sup>2</sup>

After counsel have propounded to an expert a hypothetical question, based on the facts assumed to have been proved in accordance with their theory of the case, opposing counsel may propound the same question to the same witness based on the facts assumed in the opposing theory.<sup>3</sup>

Upon the trial of a person indicted for murder, where the defense was insanity, it was held no error to require the defendant to submit his hypothetical case to his professional witnesses, before the rebutting evidence of the State was heard on the question of sanity. The court declaring that if evidence materially varying the hypothetical case was afterwards introduced, the defendant must ask leave to re-examine as to new matter.<sup>4</sup>

§ 34. **Questions to Experts Should not Embrace Questions of Law.**—It is not proper to so frame a question to an expert as to call for an expression of an opinion as to the law of the case. For instance, it is improper to ask a medical expert whether a person possessed sufficient mental capacity to enable

<sup>1</sup> *People v. Augsbury*, 97 N. Y. 501; *Louisville, etc. R. R. Co. v. Falvey*, 104 Ind. 409, 415, 416; *Geisendorf v. Eagles*, 106 Ind. 38; *People v. Sutton*, 73 Cal. 243.

<sup>2</sup> *People v. Augsbury*, 97 N. Y. 501.

<sup>3</sup> *Davis v. State*, 35 Ind. 496; *Louisville, etc. R. R. Co. v. Falvey*, 104 Ind. 409, 421; *Williams v. The State*, 64 Md. 384, 393.

<sup>4</sup> *Dove v. State*, 52 Tenn. 348.

him to make a will.<sup>1</sup> The question should be so framed as to require him to state the degree of intelligence or imbecility of the person, in the best way he can, by the use of such ordinary terms as will best convey his own ideas of the matter.<sup>2</sup> Or the witness may be asked whether the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will.<sup>3</sup>

§ 35. **Questions to Experts as to Particular Cases.**

—While the opinion of experts may be based on their observation and experience in similar cases, yet the principle is well settled that such witnesses cannot, on their direct examination, be questioned concerning the particular cases which have happened to come within their observation, and which have no connection with the case in hand.<sup>4</sup> The reason for the rule is manifestly to prevent the introduction of innumerable side issues, which might render the trial of a cause interminable, distract the attention of the jury from the real issue, and render the costs in the case unnecessarily burdensome and enormous. Different experts might have different theories, and each theory might be founded on the observance of several and distinct cases, each of which the opposite party would have a right to controvert. And

<sup>1</sup> *Farrell v. Brennan*, 32 Mo. 328; *McClintock v. Card*, 32 Mo. 411; *May v. Bradlee*, 127 Mass. 414; *Gibson v. Gibson*, 9 Yerg. 329; *White v. Bailey*, 10 Mich. 155.

<sup>2</sup> *Fairchild v. Bascomb*, 35 Vt. 416, 417; *State v. Hayden*, 51 Vt. 304; *Crowell v. Kirk*, 3 Dev. (N. C.) 358.

<sup>3</sup> *McClintock v. Card*, 32 Mo. 411.

<sup>4</sup> 1 Greenl. Ev. § 448; *Clark v. Willett*, 35 Cal. 534, 544; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Jonau v. Ferrand*, 3 Rob. (La.) 366; *Horne v. Williams*, 12 Ind. 324.



inasmuch as a party would be unable to anticipate the cases which the experts on the other side would mention, he would be unable to prepare for their investigation, and would, therefore, be unable to properly avail himself of his right to controvert them.

§ 36. **An Expert Cannot be Asked for an Opinion on Facts not Stated.**—An expert, testifying from personal knowledge, cannot be asked for an opinion based on facts which he has not given in evidence. He should be first asked as to the facts, and then allowed to state his opinion.<sup>1</sup> This is necessary to enable the correctness of the opinion expressed to be tested by calling other experts, and obtaining their opinion upon the same state of facts. It is equally necessary to enable the jury to have the means of determining whether the facts upon which the opinion is predicated were correct or not. Hence, it has been held improper to ask a physician “whether a person was in good health and free from any symptoms of disease,” he not having testified to any facts from which it could be seen upon what his opinion was based.<sup>2</sup> For the same reason the

<sup>1</sup> Burns v. Barrenfield, 84 Ind. 43, 48, where it is said: “It is the clear right and duty of the jury to judge of the truth of the facts upon which the opinion of the expert is based. If his opinion is based upon what he may suppose he knows about the case, upon facts, it may be altogether irrelevant and unknown to the jury, it would be impossible for them to pass upon the truth of the facts upon which the opinion may be based, or to apply the opinion of the expert to the facts. Neither court nor jury can know the facts upon which the opinion rests. It is obvious that where the expert delivers his opinion from what he supposes he knows about the case, he must assume and exercise both the functions of the court and the jury—he determines that what he knows is both relevant and true. The relevancy of the facts must be determined by the court, their truth by the jury. The witness cannot pass upon such questions.” To same effect, Louisville, etc. R. R. Co. v. Falvey, 104 Ind. 409, 419.

<sup>2</sup> Reid v. Piedmont, etc. Life Ins. Co., 58 Mo. 425.

following question has been held improper: "From what you found at the time, in the examination of her, from your knowledge of her during the years previous, and from the symptoms which you observed at that time, paralysis or trouble with her limbs, and the other difficulties under which she is laboring, what in your opinion produced the condition that you then found her in?"<sup>1</sup> So it has been held improper to ask experts who saw a railroad accident, whether, in their opinion, after having seen the accident, anything could have been done by the conductor to prevent it. It called for an opinion not derived from the testimony, but simply from what was seen at the time of the occurrence.<sup>2</sup>

The opinion of an expert is inadmissible if based on facts which he has heard outside the court room, and which he believes to be credible.<sup>3</sup> An exception exists in the case of physicians whose testimony is based in part on declarations of patients, but that is elsewhere considered.<sup>4</sup>

§ 37. **Other Matters Pertaining to the Examination and Cross-Examination of Experts.**—It is a rule of evidence that an expert may be asked by either party as to the reasons on which his opinion is based; or he may, with the permission of the court, give such explanation on his own account. Counsel have a right in every case to the reasons upon which the opinion of the expert is based.<sup>5</sup> In an early

<sup>1</sup> Van Deusen v. Newcomer, 40 Mich. 120.

<sup>2</sup> Haggerty v. Brooklyn, etc. R. R. Co., 61 N. Y. 624.

<sup>3</sup> Polk v. State, 36 Ark. 117, 124; Baltimore, etc. R. R. Co. v. Shipley, 39 Md. 251.

<sup>4</sup> See section 47.

<sup>5</sup> State v. Hooper, 2 Bailey (S. C.) Law, 37; Fairchild v. Bascomb, 35 Vt. 398, 406; Lincoln v. Taunton Manufacturing Co., 9 Allen (Mass.) 182, 191, 192; Keith v. Lothrop, 10 Cush. (Mass.) 457; *In re Springer*,

case in Massachusetts, the depositions of medical experts on the question of a person's sanity were rejected because the experts did not state the reasons for their opinion.<sup>1</sup> "Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant."<sup>2</sup> Neither judge nor jury can know what credence to give to a mere opinion, unless the reasons on which it is founded are set forth. The opinion of an expert may be contradicted, by showing that at another time he had expressed a different opinion,<sup>3</sup> and he may be asked as to the grounds upon which the change of his opinion had been brought about.<sup>4</sup> While the inquiry into the grounds and reasons of the opinion of an expert is more frequently made on the cross-examination of the witness, yet there is no objection to its being made on the direct examination.<sup>5</sup> The rule is laid down that in the examination of experts considerable latitude of inquiry is to be indulged, and that counsel are not to be limited by any narrow or stringent rules, either in obtaining their opinions upon the facts disclosed, or in ascertaining their skill and competency, or the want of them.<sup>6</sup> "There must be some limit to such an inquiry, and from the nature of the case, no definite limit can be prescribed as a rule of law. The court ought to

4 Penn. Law J. 275; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295; *Leache v. The State*, 22 Tex. App. 279.

<sup>1</sup> *Dickinson v. Barber*, 9 Mass. 218.

<sup>2</sup> *Stephen's Dlg. of Ev.*, Art. 54.

<sup>3</sup> *Sanderson v. Nashua*, 44 N. H. 492.

<sup>4</sup> *People v. Donovan*, 43 Cal. 162.

<sup>5</sup> *Dickenson v. Fitchburg*, 13 Gray, 546, 557.

<sup>6</sup> *Leopold v. Van Kirk*, 29 Wis. 548, 555; *Brown v. Chenoworth*, 51 Tex. 469.



permit the inquiry to proceed far enough to enable the jury to judge of the reasonableness of the witness' pretensions to skill, so far as such an inquiry can afford the means.'"<sup>1</sup> We have seen that on the preliminary examination for the purpose of determining whether a witness is qualified to testify as an expert the court is at liberty to examine other witnesses to aid it in determining whether the witness in question is qualified to give testimony as an expert.<sup>2</sup> But it is now to be observed that after a witness has been admitted to testify as an expert, evidence cannot be given to the jury of the opinion of other experts in the same science, that the witness is qualified to draw correct conclusions on the science on which he has been examined,<sup>3</sup> the general rule being, that after such a witness has been adjudged competent by the court, his reputation can only be sustained after it has been impeached.<sup>4</sup> Any different rule, it has been said, "would lead to anything but a satisfactory result. Another witness might then be called to give his opinion as to the capacity of him just examined, to form a correct opinion on the degree of weight which was due to the testimony of the first, and so on. The jury are to judge of the weight due to the opinion of medical men on the disease, from the facts detailed by them, and the reasons given in support of their conclusions, not from the opinion others may form of their capacity.'"<sup>5</sup> It has been held competent, however, for one expert to testify

<sup>1</sup> *Andre v. Hardin*, 32 Mich. 326.

<sup>2</sup> See section 17.

<sup>3</sup> *Tullis v. Kidd*, 12 Ala. 648.

<sup>4</sup> *De Phul v. State*, 44 Ala. 39.

<sup>5</sup> *Brabo v. Martin*, 3 La. R. 177.

as to the skill of another, where the knowledge of the witness was derived from personal observation, as distinguished from an opinion based on such expert's general reputation.<sup>1</sup> In the case cited, one expert was allowed to testify as to the correctness of the tests used by another expert in testing for arsenic. A witness called as an expert cannot be asked, on cross-examination, whether he considers himself as good a judge of the matter in dispute, as other witnesses who have testified as experts, for the reason that such a question is simply an attempt to get the opinion of the witness as to the value of the testimony of the experts on the other side.<sup>2</sup> When a witness has been adjudged competent upon the preliminary examination, opposing proof going to his incompetency is to be addressed to the jury to affect the value of his testimony, and not to the court for the purpose of excluding his opinion.<sup>3</sup> Attention has been called to the fact that it is no ground for objection, that counsel was not permitted on the preliminary examination of the expert, to cross-examine him for the purpose of testing his competency, the opportunity existing on the cross-examination-in-chief to test and impeach his skill,<sup>4</sup> as the extent of an expert's acquaintance with the subject-matter may always be inquired into, to enable the jury to estimate its weight.<sup>5</sup> When an expert was called and asked if he concurred in the statement of another expert witness, and if not, to state wherein

<sup>1</sup> *Laros v. Commonwealth*, 84 Pa. St. 200, 209.

<sup>2</sup> *Haverhill Loan, etc. Ass. v. Cronin*, 4 Allen (Mass.), 141.

<sup>3</sup> *Washington v. Cole*, 6 Ala. 212.

<sup>4</sup> See section 17.

<sup>5</sup> *Davis v. State*, 35 Ind. 496.

he differed, the court held this method of examination to be erroneous. "The mode sought to be adopted in eliciting the opinion of this witness may have the merit of being expeditious, but it might be attended with some unfairness toward the witness himself as well as to the opposite party. Witnesses called upon to testify professionally should be left free to give their own individual opinion upon the facts involved, unconnected with, and untrammelled by the opinions of others who may have been examined."<sup>1</sup>

§ 38. **General Rules Governing the Examination of Witnesses.**—It would be foreign to our purpose to consider in detail those rules of evidence regulating the examination of witnesses, which are alike applicable to the examination of professional and non-professional witnesses. Yet a concise statement of the more important principles to be observed in such cases may be found of convenience in this connection:

I. Evidence should be confined to the points in issue, and evidence of collateral facts which are incapable of affording any reasonable presumption as to the principal matter in dispute, should not be received.<sup>2</sup>

(a) Evidence of collateral facts may, however, be received when the question is a matter of science, and where the facts proved, though not directly in issue, tend to illustrate the opinions of scientific witnesses.<sup>3</sup>

II. Leading questions should not be asked on the

<sup>1</sup> *Horne v. Williams*, 12 Ind. 324.

*Stroh v. Hinchman*, 37 Mich. 490; *White v. Graves*, 107 Mass. 325; *Mansfield Coal Co. v. McEnery* 91 Pa. St. 185.

<sup>3</sup> 1 *Taylor on Evidence*, § 337.



direct, but may be asked on the cross-examination of a witness.<sup>1</sup>

(a) The above rule may be relaxed when made necessary by the complicated nature of the matter concerning which the witness is interrogated.<sup>2</sup>

(b) And the rule does not apply when the witness appears to be hostile to the party producing him.<sup>3</sup>

III. In England the rule is that the examination *and cross-examination* of a witness must relate to the facts in issue, or relevant or deemed to be relevant thereto, while the re-examination must be directed to an explanation of the matters referred to in the cross-examination.<sup>4</sup> But in this country, the weight of authority is in favor of confining the cross-examination of the witness to the facts testified to in chief.<sup>5</sup> The English rule has been substantially adopted in Massachusetts and a few other American States.<sup>6</sup> In Michigan, the English rule has been acted on in practice, and the rulings of the Supreme Court of that State are as liberal as those of the Supreme Court of Massachusetts on the same subject.<sup>7</sup>

IV. On the cross-examination, a witness may be asked any question tending, (1) to test his accuracy, veracity or credibility, or, (2) to shake his credit by

<sup>1</sup> State v. Benner, 64 Me. 267; Doran v. Muller, 78 Ill. 342; People v. Oyer, etc. Court, 83 N. Y. 436.

<sup>2</sup> Bullard v. Hascall, 25 Mich. 132.

<sup>3</sup> Farmers' Ins. Co. v. Bair, 87 Pa. St. 124.

<sup>4</sup> Stephens' Dig. of Ev., Art. 127.

<sup>5</sup> Houghton v. Jones, 1 Wallace, 702; Hughes v. Westmoreland Co., 104 Pa. St. 207; People v. Miller, 33 Cal. 99; State v. Smith, 49 Conn. 376; Hurlbut v. Meeker, 104 Ill. 541.

<sup>6</sup> Blackington v. Johnson, 126 Mass. 21; Beal v. Nichols, 2 Gray, 262; Linsley v. Lovely, 26 Vt. 123; State v. Sayers, 58 Mo. 585; Kibler v. McIlwain, 16 S. C. 550.

<sup>7</sup> Turnbull v. Richardson, 69 Mich. 416; People v. Barker, 60 Mich. 277, 302.

injuring his character. And he may be compelled to answer the same, unless such answer would tend to criminate himself.<sup>1</sup>

V. If, on the cross-examination, a witness is asked a question which is relevant only in that it may tend to shake his credit by injuring his character, his answer cannot be contradicted unless, (1) he has denied facts tending to show that he is not impartial, or, (2) he has been asked and has denied or refused to answer whether he has been convicted of some criminal offense.<sup>2</sup>

VI. On the cross-examination, a witness may be asked as to any former statements which he may have made, and which are inconsistent with his present testimony. If he denies having made them, they may be proven against him.<sup>3</sup>

VII. The court in its discretion may permit a witness to be recalled for further examination. If permission is granted for further examination-in-chief, or further cross-examination, the parties have the right of further cross-examination and of further re-examination respectively.<sup>4</sup>

VIII. A party is entitled to the cross-examination of a witness who has been, (1) examined-in-chief, or, (2) according to the English rule, if he has been intentionally sworn.<sup>5</sup>

<sup>1</sup> *People v. Arnold*, 40 Mich. 710; *Duncan v. Seeley*, 34 Mich. 369; *People v. Noelke*, 94 N. Y. 137; *Commonwealth v. People*, 105 Mass. 163; *Storm v. United States*, 94 U. S. 76; *Player v. Burlington, etc. R. Co.*, 62 Iowa, 723.

<sup>2</sup> *Collins v. Stephenson*, 8 Gray, 438.

<sup>3</sup> *Horton v. Chadbourn*, 31 Minn. 322; *State v. McLaughlin*, 44 Iowa, 82; *Conrad v. Griffey*, 16 How. (U. S.) 38; *People v. Devine*, 44 Cal. 452; *State v. Grant*, 79 Mo. 113.

<sup>4</sup> *Continental Ins. Co. v. Delpenich*, 82 Pa. St. 225; *Cummings v. Taylor*, 24 Minn. 429.

<sup>5</sup> *Stephens' Dig. of Evidence*, Art. 126.

§ 39. **Excluding Experts from the Court Room during the Examination of Witnesses.**—The principle is well settled that the judge, on the application of either party, may, at his discretion, order a separation of ordinary witnesses, in order that they may be prevented from hearing the testimony of the witnesses as given in the court room.<sup>1</sup> And this practice was established at an early period, being referred to with approbation by Fortescue, in his work *De Laudibus Legum Angliæ*.<sup>2</sup> It is evident that in case of the expert witnesses an exception should be made. As they are to be examined as to opinions based on facts testified to by other witnesses, they should be allowed to remain in court and hear the evidence relating to the facts. But when the testimony as to the facts is closed, and the expert testimony commences, the judge may, in his discretion, order a separation of the expert witnesses. Such is the practice in Scotland, where it has been the usual practice to exclude medical witnesses as soon as the medical experts commence testifying concerning matters of opinion.<sup>3</sup> In England the rule is laid down that “medical or other professional witnesses, who are summoned to give

<sup>1</sup> *Selfe v. Isaacson*, 1 F. & F. 194; *Southey v. Nash*, 7 C. & P. 632; *Regina v. Newman*, 3 C. & K. 260; *McLean v. State*, 16 Ala. 672; *Wilson v. State*, 52 Ala. 299; *Pleasant v. State*, 15 Ark. 624, 633; *People v. Boscovitch*, 20 Cal. 436; *Johnson v. State*, 2 Ind. 652; *Errisman v. Errisman*, 25 Ill. 136; *Davenport v. Ogg*, 15 Kan. 363; *Sartorius v. State*, 24 Miss. 602; *Dyer v. Morris*, 4 Mo. 214; *State v. Fitzsimmons*, 30 Mo. 236; *State v. Zellers*, 7 N. J. L. 220; *Laughlin v. State*, 18 Ohio, 99; *State v. Salge*, 2 Nev. 321; *Hopper v. Commonwealth*, 6 Gratt. (Va.) 684; *Benaway v. Conyne*, 3 Chand. (Wis.) 214.

“Et si necessitas exegerit dividantur testes hujus modi, donec ipsi de posuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum.” C. 26.

<sup>3</sup> *Allison's Practice of Crim. Law of Scotland*, 542.



scientific opinions upon the circumstances of the case, as established by other testimony, will be permitted to remain in court until this particular class of evidence commences, but then, like ordinary witnesses, they will have to withdraw, and to come in one by one, so as to undergo a separate examination.'"<sup>1</sup> And in this country the principle is similarly stated.<sup>2</sup>

§ 40. **Right of the Court to Limit the Number of Expert Witnesses.**—The number of expert witnesses, whose testimony will be received in any particular case, rests in the sound discretion of the trial court. In the old Roman law, the power of the court to limit the number of experts who could be sworn, and even to select two or three from those proposed by the parties, excluding the others, was conceded to exist.<sup>3</sup> And in this country, the right of the court to decline to permit certain witnesses to be sworn as experts, after a sufficient number have already been examined, has been maintained in several cases.<sup>4</sup> But it would not be proper for the court to limit a party to one witness on any vital point.<sup>5</sup> In France the number of experts who may be examined in questions of handwriting seems to be limited to three,<sup>6</sup> while in Kansas the opinions of at least three experts are required by law to establish the genuineness of a disputed writing.<sup>7</sup> In a recent case in

<sup>1</sup> 2 Taylor's Ev., § 1259. And see Tait. Ev. 420.

<sup>2</sup> 1 Wharton's Ev., § 492.

<sup>3</sup> Bartol in L. 1, pr. de ventr. iasp. no. 5; Bald. in L. 20, cod. de fide inst.

<sup>4</sup> Sizer v. Burt, 4 Denio, 426; Anthony v. Smith, 4 Bos. (N. Y.) 503, 508; Fraser v. Jennison, 42 Mich. 206, 223.

<sup>5</sup> See Hubble v. Osborn, 31 Ind. 249.

<sup>6</sup> Code de Procedure civile, Part I, l. 2, tit. 10, s. 200.

<sup>7</sup> Gen. Stat. (1868) p. 854, § 216.

Michigan, involving testamentary capacity, the trial court, after listening to the testimony of five experts called by the contestants of the will, declined to permit a sixth expert to be examined. The Supreme Court sustained the action of the court below, and Mr. Justice Cooley said: "If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence, and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the court will consent to their examination; and if legal controversies are to be determined by the preponderance of voices, wealth, in all litigation in which expert evidence is important, may prevail almost of course. But one familiar with such litigation can but know that, for the purposes of justice, the examination of two conscientious and intelligent experts on a side is commonly better than to call more. And certainly when five on each side have been examined, the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies that must be found in the testimony of those even who in the main agree begin to attract attention and occupy the mind, until at last, jurors, with their minds on unimportant variances, come to think that expert evidence, from its very uncertainty, is worthless. This is not a desirable state of things, and it can only be avoided by confining the use of expert evidence within reasonable bounds."<sup>1</sup>

§ 41. **By Whom Expert Witnesses are Selected.**— In France experts are officially delegated by the

<sup>1</sup> *Fraser v. Jennison*, 42 Mich. 206, 223. See *People v. Kemp*, 76 Mich. 420.

court, to inquire into the facts and report thereon.<sup>1</sup> The court *ex officio* may order an *expertise* whenever it considers such a course desirable, or the court may order it at the request of the parties. An order for an *expertise* must contain a statement of the precise matter to be submitted, and an appointment of the experts as well as of a referee. The parties may agree on the experts, but if they do not agree the court will make the appointment without reference to the parties. As a rule, the court cannot appoint less than three. *Avocats* or barristers are not allowed to appear before the experts, but the parties are represented before them by persons specially skilled in the subject-matter under inquiry. They are also represented by *avoués*. As a rule, any one can be appointed by the court, although, as a matter of fact, the selection of the experts is usually made from a list of specialists called *experts assermentés*.<sup>2</sup> But in Germany even greater care has been taken to provide, that only those who are in every way qualified by their learning and experience shall be permitted to testify in the character of experts. The courts of that country are not granted the power of appointment, nor allowed to pass upon the qualifications of the witnesses, but the experts in criminal cases first summoned are exclusively those whom the State, after prior examination of their competency and skill in such particular inquiries, has duly authorized to testify in such cases. In addition to this, provision is made for an appeal to a tribunal of experts, to which the opinions of the expert witnesses can be referred.<sup>3</sup> In Prussia it was the practice for the State

<sup>1</sup> Code de Procedure civile, Part I, l. 2, tit. 10, s. 200.

<sup>2</sup> See Am. Law Review for 1885, p. 392.

<sup>3</sup> Casper's Gericht Med., Berlin, 1871, I, § 3. See 2 Wharton & Stille's Med. Juris. (Part II) § 1249.



to appoint as experts a physician and surgeon for every county. A medical college was established for each province, to which men of peculiar knowledge in medical jurisprudence were assigned. And if a difference of opinion existed between the county experts, or the parties desired an appeal, the case could be brought before this medical college of the province. In addition to this an appellate medical commission for the whole Kingdom existed.<sup>1</sup> In England and in this country, as all know, the practice has been entirely different from that adopted in either France or Germany. Both here and in England the parties usually select their own experts, and pay them their compensation. The adoption in this country of the German system of governmental experts has been advocated by a distinguished writer on medico-legal questions,<sup>2</sup> who proposes that there should be selected after an adequate competitive examination, a medical expert for each county in a State, to whom should be referred all questions of medical science that might arise in litigation. It is proposed that it should be his duty to take testimony bearing on such questions, and hear counsel thereon, and after having judicially heard the case, should certify his opinion to the court, by whom the reference was made. In proper cases an appeal could be taken from such an opinion to a Supreme Court of governmental experts appointed by the state at large. In this way it is thought that the expert would be free from the embarrassment of any personal relations to the parties. "He will have no client to serve, and no past partisan extravagances to

<sup>1</sup> *Rechts lexicon*, Leipzig, 1870, I, 478.

<sup>2</sup> *Wharton & Stille's Medical Jurisprudence*, Part II, § 1250.

vindicate. He will render his opinion as the advocate neither of another nor of himself. When he speaks he will do so judicially, as the representative of the sense of the special branch of science which the case invokes, governed by the opinion of the great body of scientists in this relation, and advised of the most recent investigations. When this is done we will have expert evidence rescued from the disrepute into which it has now fallen, and invested with its true rights as the expression of the particular branch of science for which it speaks." The appointment of a board of state experts certainly has much to commend it to judicial approval. By the adoption of some such system, the mature judgment of the best minds could be obtained, and the superficial opinions of quacks and mountebanks would not be thrust upon the jury to their confusion and to the hinderance of justice. Whether the experts are appointed by the court or by the state, in either case there would be eliminated the embarrassment caused by having the experts appear in the case as the interested partisans of the party by whom they are called and specially paid. But while we should under the system proposed be rid of some of the embarrassments we now labor under, there are certain disadvantages connected with it which seriously detract from its practicable value. Men eminent in one branch of their profession often have but a superficial knowledge of other branches, and a physician who may be very able and learned in certain subjects connected with his profession, may be quite ignorant of certain intricate questions of medical science. If all questions of medical science had to be referred to a board of governmental ex-

perts, suitors would be practically prohibited from availing themselves of the testimony of other experts, who might be much better qualified by their special knowledge on that particular subject to form a correct and accurate opinion.

Sir James Fitzjames Stephen in his *History of the Criminal Law* declares that he has the strongest possible opinion in favor of the maintenance of the present system. "Our present system," he says, "provides a definite place and definite rights and duties for the parties, the judge, the jury, and the witnesses. What room there is for any other person in the proceedings I do not see. It is impossible to say what an expert is to be if he is not to be a witness like other witnesses. If he is to decide upon medical or other scientific questions connected with the case so as to bind either the judge or the jury, the inevitable result is a divided responsibility which would destroy the whole value of the trial. If the expert is to tell the jury what is the law—say about madness—he supersedes the judge. If he is to decide whether, in fact, the prisoner is mad, he supersedes the jury."<sup>1</sup>

A distinguished writer on the jurisprudence of medicine, has expressed the opinion that it would be better to take away from counsel the examination of experts, and devolve it upon the court. "It would be better," he says, "were it possible, for the court alone to examine experts upon those points on which their professional opinions are needed, rather than to hand them over to counsel, each of whom has an interest in making their testimony aid his own side, and to that extent forcibly impressing upon it

<sup>1</sup> 1 Stephen's *History of the Crim. Law*, p. 575.



a unilateral character.'"<sup>1</sup> The learned writer has overlooked the fact that it is necessary to a thorough and enlightened examination of an expert witness on an intricate question of medical, or other science, that the examiner should make himself as familiar as possible with the subject-matter of inquiry. To prepare himself for the examination of an expert witness, counsel often spend days and even weeks in the careful investigation of the scientific question involved. This the court cannot do, both for want of time and for want of knowledge of the questions which will be raised. It is the part of wisdom that the inquisitorial and judicial functions should be so far as possible kept distinct.

<sup>1</sup> Ordonaux's *Jur. of Medicine*, § 104, p. 123.

## CHAPTER IV.

EXPERT TESTIMONY IN MEDICINE, SURGERY AND  
CHEMISTRY.

## SECTION.

42. Competency of Physicians to Testify as Experts.
43. Disqualification Arising from Information Acquired While Attending Patient.
44. Cases in Which Physicians may Testify Notwithstanding the Prohibitory Statutes.
45. Partial Waiver of the Privilege.
46. Opinions Based on Statements Made out of Court and not Under Oath.
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51. Medical Testimony Relating to Wounds.
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54. Detection of Poison by Experts.
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63. Expert Testimony on the Subject of Hair.
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67. Opinions of Non-Professional Witnesses as to Mental Condition.
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76. The Subject of Inquiry—Structural Defect—Impracticability of Consumption.
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78. Compulsory Examination in Criminal Cases.
79. Compulsory Examination in Actions for Damages.
80. Refusal to be Examined by a Particular Expert who is Personally Obnoxious.
81. The Opinions of Medical Men in Miscellaneous Cases.
82. Opinions of Non-Professional Witnesses on Questions Related to Medical Science.
83. Experts in the Diseases of Animals.

§ 42. **Competency of Physicians to Testify as Experts.**—The principle is well established that physicians and surgeons of practice and experience are experts in medicine and surgery, and that their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice.<sup>1</sup> Persons are presumed to understand questions appertaining to their own profession.<sup>2</sup> While the above is the general rule, it will be well to notice certain other principles on which courts have acted in determining questions of competency in the case of physicians and surgeons.

<sup>1</sup> *Hathaway Admr. v. National Life Ins. Co.*, 48 Vt. 335, 351; *De Phue v. State*, 44 Ala. 39; *Livingston v. Commonwealth*, 14 Gratt. (Va.) 592; *Bird v. Commonwealth*, 21 Gratt. (Va.) 800; *State v. Clark*, 15 S. C. (N. S.) 403, 408; *Olmsted v. Gere*, 100 Pa. St. 127; *State v. Slagle*, 83 N. C. 630.

<sup>2</sup> *Jones v. White*, 11 Humph. (Tenn.) 268; *Missouri Pacific R. R. Co. v. Finley*, 38 Kan. 550.



1. In the absence of some statutory provision on the subject, it is not necessary that physicians or surgeons should be graduates of any medical college, or have a license to practice from any medical board, in order to render them competent to testify as experts in relation to matters connected with their profession.<sup>1</sup> If it is shown that the witness is a practicing physician or surgeon, it is sufficient evidence that he is competent to express an opinion upon a medical question. But in Wisconsin the legislature has enacted a law expressly providing that "no person practicing physic or surgery shall have the right \* \* \* to testify in a professional capacity as a physician or surgeon in any case, unless he shall have received a diploma from some incorporated medical society or college, or shall be a member of the State or some county medical society, duly organized in this State."<sup>2</sup>

2. The system of medicine pursued by the practitioner is, in general, immaterial, the law not recognizing any particular school of medicine to the exclusion of others.<sup>3</sup>

The law does not concern itself with the merits of particular systems of medicine, medicine not being an exact science. In the case above cited the court say: "The popular axiom, that doctors differ, is as true now as it ever was, and as long as it continues to be so, it is impossible for the law to recognize any class of practitioners, or the followers of any partic-

<sup>1</sup> *New Orleans, etc. R. R. Co. v. Allbritton*, 38 Miss. 242; *State v. Speaks*, 94 N. C. 865, 874.

<sup>2</sup> *Wis. An. Stats.* (1889), p. 888, § 1436.

<sup>3</sup> *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.), 1; *Bowman v. Woods*, 1 Greene (Iowa), 441.

ular system or method of treatment, as exclusively entitled to be regarded as doctors."

3. Neither is it necessary that the medical witness should have made a specialty of the particular disease which is the subject of inquiry. A general practitioner is, ordinarily, a competent witness.<sup>1</sup>

It is a well known fact that at the present day various classes of disease have been made specialties, and that many practitioners devote themselves exclusively to certain diseases of the eye, or ear, or lungs and throat, or heart, or nervous diseases, or diseases of the brain. But the law does not require the medical witness to have made a specialty of any one of these subjects to qualify him to testify in relation to the same. Thus, it has been held that a physician may be examined as to injuries done to the eyes of a party by violence, although he may not be a surgeon or an oculist.<sup>2</sup>

4. But one who devotes himself exclusively to one branch of his profession, making a specialty of that, and having no practical experience beyond it, is incompetent, as a general rule, to express an opinion on a question that does not pertain to his specialty.

For example, a specialist in diseases of the eye cannot testify as an expert in relation to mental diseases.<sup>3</sup> And so it has been held that a physician was incompetent to express an opinion upon the question of insanity, whose habit it had been, when his patients required medical treatment for insanity,

<sup>1</sup> *Hathaway v. National Life Ins. Co.*, 48 Vt. 335, 351; *State v. Reddick*, 7 Kan. 143; *Hastings v. Rider*, 99 Mass. 622; *Horton v. Green*, 64 N. C. 64; *Kelly v. United States*, 27 Fed. Rep. 616; s. c., 8 Cr. Law Mag. 174.

<sup>2</sup> *Castner v. Sliker*, 33 N. J. L. 95; s. c., *Ib.* 507.

<sup>3</sup> *Fairchild v. Bascomb*, 35 Vt. 410.

to call in the services of a physician who had made a special study of mental diseases, or to recommend their removal to a hospital for the insane.<sup>1</sup>

5. A general practitioner is probably not incompetent to give expert testimony on the ground that he had not had, in his experience, a case like the one in question.<sup>2</sup>

In a case in New Hampshire, a practicing physician, whose knowledge of the particular subject of inquiry was derived from study alone, was held competent to express an opinion as an expert.<sup>3</sup> And on a trial for abortion, a physician was held competent to state the effect of a certain drug on the womb, although he was without any personal knowledge of the effects of the drug, his knowledge on the subject being derived from reading.<sup>4</sup>

But a contrary ruling has been made in the Supreme Court of Wisconsin, in a criminal trial for murder by poison. In that case the witness had been a practicing physician for twenty-five or thirty years, but he had never had a case of arsenical poisoning to treat as a physician, and stated that all his knowledge about the symptoms of arsenical poisoning was derived from his study of medical works, and from the instruction at a medical college, and not from any practical observation of his own. He was on that account held incompetent to testify that certain symptoms which had been described indicated arsenical poisoning.<sup>5</sup>

<sup>1</sup> Commonwealth v. Rich, 14 Gray (Mass.), 335.

<sup>2</sup> State v. Clark, 12 Ired. (N. C.) 151; Hathaway's Admr. v. National Life Ins. Co., 48 Vt. 335. And see section 19.

<sup>3</sup> Taylor v. Grand Trunk R. R. Co., 48 N. H. 304.

<sup>4</sup> State v. Wood, 53 N. H. 484.

<sup>5</sup> Soquet v. The State, 72 Wis. 659.



6. But a general practitioner does not seem to be competent to testify as an expert on a question which pertains to a particular branch of medical science to which the witness has given no study, and concerning which he has had neither observation nor experience.

For example, in a recent case in Mississippi, the court declared, that a medical practice confined to the treatment of ordinary diseases, does not qualify a physician to testify as an expert upon insanity upon hypothetical interrogations as to supposed facts, of which he had no personal knowledge.<sup>1</sup> But his testimony is admissible if he has a personal knowledge of the facts,<sup>2</sup> or if he has studied somewhat the subject of psychological medicine.<sup>3</sup> It has been held that a physician who had been in practice for several years, but who had no experience as to the effect upon health of breathing illuminating gas, could not testify in relation thereto, as an expert.<sup>4</sup> The fact that he was a physician, it was said, did not necessarily give him any knowledge of gas and its effects upon health; and an experience in attending other persons, who were alleged to have been made sick by breathing gas from the same leak, was pronounced insufficient.

7. A physician or surgeon, otherwise qualified, is not to be considered disqualified to give expert testimony on the ground that he is not engaged in practice at the time.<sup>5</sup>

<sup>1</sup> *Russell v. State*, 53 Miss. 367. And likewise *Commonwealth v. Rich*, 14 Gray (Mass.), 335.

<sup>2</sup> *Baxter v. Abbott*, 7 Gray (Mass.), 71.

<sup>3</sup> *State v. Reddick*, 7 Kan. 143; *Davis v. State*, 35 Ind. 496. See too *Bitner v. Bitner*, 65 Pa. St. 347, and *Pidcock v. Potter*, 68 Pa. St. 347.

<sup>4</sup> *Emerson v. Lowell Gas Light Co.*, 6 Allen, 146.

<sup>5</sup> *Everett v. The State*, 62 Ga. 65. And see section 18.

The fact that he is not at the time in practice, does not go to his competency, but only to his credit.<sup>1</sup>

Hence, a witness was held competent to testify as a medical expert, who stated that he had attended a course of medical lectures, had obtained a license from the State, and had practiced as a physician for a year, when he abandoned the medical profession for that of the law, which had been his profession for the last sixteen years, but that he had continued to read medical works, had kept up with the improvements made in the science of medicine, and felt competent to express a medical opinion upon the subject of inquiry.<sup>2</sup>

8. But whether he must at some time have been engaged in active practice seems not quite clear.

In a case in Alabama, decided in 1847, the court seemed inclined to the opinion that it was not necessary that the witness should have been in active practice, but what was then said was simply *obiter dicta*. The court said: "If one asserts an ability to give correct opinions upon any art or science, from an acquaintance with the subject, acquired by observation and study, we cannot perceive on what ground he can be rejected because he has not been in the actual practice of his profession."<sup>3</sup> On the other hand, in a case in Vermont in 1862, that court says: "The mere fact that a person was, by education, a physician, if he had not practiced his profession, we should not deem sufficient to justify his admission as an expert."<sup>4</sup>

<sup>1</sup> Roberts v. Johnson, 58 N. Y. 613.

<sup>2</sup> Tullis v. Kidd, 12 Ala. 648, 650.

<sup>3</sup> Tullis v. Kidd, 12 Ala. 648, 650.

<sup>4</sup> Fairchild v. Bascomb, 35 Vt. 398, 409. See section 19.

9. A person who is neither a physician nor surgeon can express an opinion on a medical question, when the matter inquired about lies within the domain of the profession or calling which the witness pursues, being common to the two professions.

For example, a chemist and toxicologist, who is not a physician or surgeon, is competent to testify as an expert concerning the effect of strychnine upon the human stomach and upon the human system. The effect of poisons on the human system falls within the scope of the science of toxicology as well as of medicine.<sup>1</sup>

So a midwife, although not a physician, is competent to testify whether the birth of a child is premature.<sup>2</sup>

§ 43. **Disqualification Arising from Information Acquired while Attending Patient.**—In the absence of any statutory provision to the contrary, it is well settled that a physician or surgeon may be compelled to disclose any communications made to him in professional confidence.<sup>3</sup> A physician, therefore, is not incompetent at the common law to testify to a professional opinion based on facts learned by him from such communications.

But in most of the States statutes have been enacted which have abrogated the common law rule on this subject. In some the statute is that "no person duly authorized to practice physic or surgery, shall be compelled to disclose any information which he may have acquired in attending any patient in a

<sup>1</sup> *The State v. Cook*, 17 Kan. 392.

<sup>2</sup> *Mason v. Fuller*, 45 Vt. 29.

<sup>3</sup> *Stephen's Dig. of Evidence*, Art. 117; *Dutchess of Kingston's Case*, Hargr. St. Tr. 243, 20 How. St. Tr. 613, 614; *Ashland v. Marlborough*, 99 Mass. 48; *Barber v. Merriam*, 11 Allen, 322; *People v. Stout*, 3 Parker Cr. Cas. 670.



professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.”

While in others it is provided that the witness shall not be competent, or shall not be allowed to make the disclosure.<sup>1</sup>

When a party seeks to exclude the testimony of a physician under these statutory provisions, the burden is on him to bring the case within the provision.

For instance, under such a provision as exists in New York, the burden would be on him not only to make it appear that the information which he seeks to exclude was acquired by the witness in attending the patient in a professional capacity, but also that it was necessary to enable him to act in that capacity.<sup>2</sup> As to the first of these conditions—that the physician attended in a professional capacity—it is not necessary that the physician should have been employed by the patient himself. Where a physician

<sup>1</sup> The statutory provision on this subject may be found as follows: Arkansas: Dig of St. 1874, p. 492, § 2485. Arizona: Comp. Laws 1877, p. 470, § 2836. California: Code of Civil Procedure (Haymond & Busch), vol. 2, p. 406, § 1881. Dakota: Revised Codes, 1877, p. 563, § 499. Idaho: Laws of 1875, § 622. Indiana: R. S. 1881, p. 93, § 497. Iowa: McClain's Annotated Code, 1888, vol. 2, § 4893. Kansas: Gen. Stat., 1889, § 4418. Michigan: 2 How. Ann. St. § 7516. Minnesota: Gen. St. 1878, p. 792, § 10. Missouri: R. S. 1879, p. 690, § 4017. Montana: Laws of 1871-2, p. 125, § 450. Nebraska: Comp. St. 1889, p. 899, § 333. Nevada: Baily & Hammond's Gen. St., § 3406. New York: Code of Proc. § 834. Oregon: Gen. Laws 1843-72, p. 251, § 702, cl. 4. Wisconsin: Sanborn & Berryman's Ann. St., vol. 1, p. 888, § 1436. Wyoming: Gen. Laws 1869, p. 572, § 325. Washington: Code 1881, p. 102, § 392. There may be other States and Territories containing similar provisions, the above list not being considered exhaustive.

<sup>2</sup> The People v. Schuyler, 106 N. Y. 298; Edlington v. Aetna Life Ins. Co., 77 N. Y. 564, 569. But see Matter of Darragh, 52 Hun, 593, where the Supreme Court does not understand the Court of Appeals as construing the statute so as to hold that it should appear that the information was necessary to enable the physician to act.

attends for consultation by request of another physician, the case falls within the statute.<sup>1</sup>

As to the second of these conditions—that the information acquired while attending the patient must have been such as was necessary to enable him to prescribe for such patient—it is clear that if the physician has acquired any information which was not necessary to enable him to prescribe, or to act as a surgeon, he can be compelled to disclose it, although he acquired it while attending the patient.<sup>2</sup>

It has been held that the fact that a witness was the jail physician, charged with the duty of observing and treating the prisoners confined in the jail, including the prisoner on trial, did not render incompetent his opinion as to the prisoner's sanity, where it did not affirmatively appear that the relation of physician and patient actually existed, and that the information was acquired through, or for the purposes of that relation. "The nominal relation of physician and patient, arising out of the legal duty of this physician, is not sufficient to exclude his opinions formed from his observations while such nominal relation only existed."<sup>3</sup>

The fact that a physician is selected and sent by the public prosecutor to attend upon a female on whom an abortion is charged to have been committed, does not prevent the professional relation of physician and patient arising between the said woman and physician so as to prevent his disclosure of any information thus acquired, she having accepted his

<sup>1</sup> *Renihan v. Dennin*, 103 N. Y. 573.

<sup>2</sup> *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 570; *Steele v. Ward*, 30 Hun (N. Y.), 555; *Campau v. North*, 39 Mich. 606.

<sup>3</sup> *People v. Schuyler*, 43 Hun (N. Y.), 88, 93—affirmed in 106 N. Y. 298.

services. She had a right to decline his assistance, but when she accepted it she had a right to deem him her physician, and treat him accordingly.<sup>1</sup>

It has been made a question under these statutes whether the information which the physician has acquired from the patient, but cannot disclose, is confined to communications made by the patient to the physician, or whether it extends to any information that was disclosed to any of his senses. The rule is that the statute protects with the veil of privilege whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose.<sup>2</sup> A communication to the physician's sense of sight is as fully within the statute as though it had been orally communicated, and information derived from observation of the patient's appearance and symptoms cannot be disclosed.<sup>3</sup>

§ 44. **Cases in which Physicians may Testify notwithstanding the Prohibitory Statutes.**—The statutes referred to in the preceding section were passed for the benefit of the patient, and for the sole purpose of enabling individuals in need of medical aid to make a full disclosure of the facts of their condition without fear of a betrayal of confidence. This being the sole purpose of the enactment of these statutes, the patient may waive the privilege which the statutes secure, the public not being concerned in the suppression of the information when there is no desire for suppression on the part of the patient.

<sup>1</sup> *The People v. Murphy*, 101 N. Y. 126, 130.

<sup>2</sup> *Briggs v. Briggs*, 20 Mich. 34.

<sup>3</sup> *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 297; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Gartside v. Conn. Mut. Life Ins. Co.*, 76 Mo. 446; *Heuston v. Simpson*, 115 Ind. 62.



With the consent of the patient the physician may testify notwithstanding the statutes.<sup>1</sup>

But the question arises whether this right of waiver is personal to the patient so that it can be exercised by him alone, his personal representatives, after his death, not being entitled to exercise it as he might have done.

In New York, under a statute expressly providing that the prohibition shall apply unless "expressly waived" by the patient, it has been held that the executor or administrator does not represent the deceased for the purpose of making the waiver.<sup>2</sup> But where the statute is absolute in terms containing no such provision as to waiver, the courts have held not only that the patient may waive the privilege, but that those who represent him may do the same for the protection of the interests they claim under him.<sup>3</sup> Accordingly, it has been held in New York that their statutory provisions are applicable to the case of physicians who in a professional capacity have acquired knowledge concerning the mental condition of their patients, and that they are incompetent witnesses to testify, from knowledge so acquired, as

<sup>1</sup> *Grand Rapids, etc. R. R. Co. v. Martin*, 41 Mich. 667; *Groll v. Tower*, 85 Mo. 249, overruling *Gartside v. Ins. Co.*, 76 Mo. 446; *Squires v. City of Chillicothe*, 89 Mo. 226; *Hoyt v. Hoyt*, 112 N. Y. 493, 515; *Morris v. Morris*, 119 Ind. 341, 344.

<sup>2</sup> The Court of Appeals of New York says: "The purpose of the laws would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy. \* \* Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by any one unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes." *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56, 59.

<sup>3</sup> *Fraser v. Jennison*, 42 Mich. 206, 225; *Morris v. Morris*, 119 Ind. 341.

to the mental soundness or unsoundness of their deceased patient, when the question involved is one of testamentary capacity,<sup>1</sup> although the evidence will be received if the objection to its reception is not seasonably interposed.<sup>2</sup> On the other hand, when the statutory provision is different from that in New York, already referred to, the legal representative may waive the privilege, and the physician may be allowed to testify as to the mental condition of a testator, although his knowledge as to such condition was obtained while in the discharge of his duty as his attending physician.<sup>3</sup>

The statutory provisions under consideration, being designed for the exclusive protection of the patient, will not be construed so as to prejudice the public interests, provided the disclosure to be obtained manifestly works no injustice to the spirit and intent of the law. Hence in a criminal case where the patient was dead, the New York court held that his physician might be allowed to testify, when the information disclosed would not prejudice the deceased, but would aid in the conviction of the criminal. In that case a prisoner was charged with murder committed by the administration of arsenic, the State called as a witness the physician who attended the deceased in a professional capacity, and inquired of him concerning the symptoms exhibited by the deceased, and what he had learned concerning his condition during the time of his attendance upon him. Counsel for the prisoner objected that the examination was contrary to the statute, but the Supreme Court overruled the objection for the

<sup>1</sup> *Mather v. Coleman*, 111 N. Y. 220; *Renihan v. Dennin*, 103 N. Y. 573.

<sup>2</sup> *Hoyt v. Hoyt*, 112 N. Y. 493.

<sup>3</sup> *Morris v. Morris*, 119 Ind. 341, 344 (1889.)

reason that it was not within the spirit and intent of the statute, although within the letter.<sup>1</sup> The matter was taken to the Court of Appeals, and the judgment of the Supreme Court affirmed, the court saying: "That the purpose for which the aid of this statute is invoked in this case is so utterly foreign to the purposes and objects of the act, and so diametrically opposed to any intention which the legislature can be supposed to have had in the enactment, so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient, and not to shield one who is charged with his murder, that in such a case the statute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim."<sup>2</sup> It is not to be understood, however, that the statute does not apply in any criminal case. It may be invoked for the protection of the criminal in cases where the latter was himself the patient of the physician whose testimony is desired.<sup>3</sup>

When it is proposed to introduce in evidence the testimony of witnesses who are disqualified by these statutes, the party who desires to claim the benefit of the statutes must seasonably exercise the privilege by objecting to the evidence at the time it is offered. It is too late after the examination has been insisted on, and the evidence has been received without objection, to raise the question of competency by a motion to strike it out.<sup>4</sup>

§ 45. **Partial Waiver of the Privilege.**—We have seen that the statutes which prohibit the disclosure

<sup>1</sup> *Pierson v. People*, 25 N. Y. Sup. Ct. 239.

<sup>2</sup> *Pierson v. People*, 79 N. Y. 434.

<sup>3</sup> *The People v. Murphy*, 101 N. Y. 126, 129.

<sup>4</sup> *Hoyt v. Hoyt*, 112 N. Y. 493, 514.



by physicians of information acquired by them in a professional capacity create no absolute incompetency and give no right to the physician to refuse to testify, but simply confer a privilege which the patient, for whose benefit the provision is made, may claim or waive. But assuming that the patient waives the privilege in the case of one physician, the important question presents itself, whether by the waiver in the case of one physician he does not waive the statute entirely and open up the whole subject rendering admissible the testimony of other physicians who are acquainted with the case. The courts, in the few cases that have thus far arisen, have held that the patient who waives the statute as to one physician does not thereby lose his right to insist on his privilege as respects other physicians. Thus, in a case where the plaintiff had three physicians, each one at a different time from the other, and allowed one of them to testify as to the extent and character of her injuries, she was allowed to insist on her privilege and exclude the testimony of the other two, who were called on behalf of the defendant.<sup>1</sup> And so where two physicians were called on one occasion in consultation, and the plaintiff waived her privilege as to one by calling him to testify, it was held that she did not thereby loose her right to insist on her privilege as against the other physician called to testify by the defendant.<sup>2</sup>

<sup>1</sup> *Hope v. Troy, etc. R. R. Co.*, 40 Hun, 438 (1886): This court say: "The defendant urges that when the plaintiff waived her right with respect to one physician she opened the case to the others, but the statute does not seem to permit such construction." To the same effect is *Penn Mutual Life Insurance Co. v. Wiler*, 100 Ind. 102.

<sup>2</sup> *Record v. Village of Saratoga Springs*, 46 Hun, 450 (1887).

§ 46. **Opinions Based on Statements made out of Court and not under Oath.**—The rule is that an expert cannot be allowed to give his opinion based upon statements made to him by parties out of court and not under oath.<sup>1</sup> His opinion to be admissible must be founded either on his own personal knowledge of the facts, upon facts testified to in court, or else upon an hypothetical question.<sup>2</sup> Hence the opinion of a physician, called in consultation with the attending physicians, cannot be received if based upon declarations made to him by such physicians, or by the wife and nurse of the patient as to his previous symptoms or condition.<sup>3</sup> It has never been held that a medical expert has the right to give in evidence an opinion based on information which he has derived from private conversations with third parties.

§ 47. **Opinions of Physicians Based in Part on Declarations of Patients.**—But the principle stated in the preceding section does not apply to the opinions of a physician or surgeon, based *in part* on statements made by the *patient* himself to the physician, to enable the latter to determine upon the proper course of treatment. Upon this point the Supreme Court of Massachusetts says: “The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms, and the causes which

<sup>1</sup> Hurst v. The C. R. I., etc. R. R. Co., 49 Iowa, 76, 79.

<sup>2</sup> Grand Rapids, etc. R. R. Co. v. Huntley, 38 Mich. 537; Hunt v. The State, 9 Texas Ct. of App. 166; Louisville, etc. R. R. Co. v. Shires, 108 Ill. 617.

<sup>3</sup> Heald v. Thing, 45 Me. 392; Wood v. Sawyer, Phillips (N. C.), 253; Wetherbee's Exr's. v. Wetherbee's Heirs, 38 Vt. 454; Hunt v. The State, 9 Texas Ct. of App. 166; Louisville, etc. R. R. Co. v. Shires, 108 Ill. 617, 630.

have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent as coming from an expert. \* \* The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury, can be known only to the person who experiences them. It is the statement and description of these which enter into, and form part of the facts on which the opinion of an expert, as to the condition of health or disease, is founded.”<sup>1</sup> An excellent illustration of the principle is afforded by a case decided in Wisconsin in 1879. The action was brought to recover damages, for an injury sustained by the negligence of the defendant, the plaintiff claiming to be lame in her hip and to suffer pain there, and that she was unable to use her limb as she had used it before the accident. That it was still so weak and painful as to render it unsafe for her to attempt to walk without the aid of a crutch. At the suggestion of the defendant, the plaintiff submitted to an examination by experts for the purpose of testing the truthfulness of the claim, and of placing before the jury her real condition. The result of the examination was that the experts found no such appearances as would indicate lameness or pain. As one of the experts testified, “the general opinion was that we could not find anything. The only way I could tell that she ached was by *what she said, and how she looked and appeared.*” Counsel for the defendant claimed that an error was committed in permitting one of the experts, who testified as above, to answer the following questions:

<sup>1</sup> Barber v. Merriam, 11 Allen, 322, 324. See also Thompson v. Trevanion, Skinner, 402; Aveson v. Kinnaird, 6 East, 188, 195, 197; Bacon v. Charlton, 7 Cush. 581, 586; Denton v. State, 1 Swan (31 Tenn.), 279.



“*Question.* Do you think that you could tell whether or not she suffered pain by the movement of the hip, judging from all the examination, including what she said? *Answer.* I think I could. *Q.* Now, go on and state whether, in your opinion, she did suffer pain? *A.* She gave every indication of suffering pain. *Q.* In your opinion, did she suffer pain? *A.* Yes, sir; that is my opinion, that she did.”

It was claimed that this was in effect, asking the witness whether he believed the statements of the plaintiff that she suffered pain. The Supreme Court held that the questions were proper. That as the plaintiff insisted upon the fact of lameness and pain, it was a question for the experts whether such pains and lameness were imaginary, feigned or real; and that to determine this, it was necessary to resort to other evidence than those to be derived from the limb itself. “And in such case, we think it is clearly competent for the expert to give an opinion from the general appearance, actions and looks of the patient, and what she says at the time in regard to her condition.”<sup>1</sup>

The above rulings are clearly sustained by the authorities. It is entirely competent for physicians or surgeons to give to the jury their opinions based on a personal examination of the patient and on statements made by the patient at that time as to the patient's present bodily condition.<sup>2</sup> Not only so, but what the patient said to the physician as to

<sup>1</sup> *Quaife v. Chicago, etc. R. R. Co.*, 48 Wis. 513.

<sup>2</sup> *Louisville, etc. R. R. Co. v. Snyder*, 117 Ind. 435; *Illinois Central R. Co. v. Sutton*, 42 Ill. 438; *Fort v. Brown*, 46 Barb. (N. Y.) 366; *Louisville, etc. R. R. Co. v. Falvey*, 104 Ind. 409; *Wilson v. Town of Granby*, 47 Conn. 59, 76; *Caldwell v. Murphy*, 11 N. Y. 416; *Denton v. The State*, 1 Swan (Tenn.), 279.

his *present* bodily condition is admissible,<sup>1</sup> although the physician cannot give to the jury as evidence the patient's history of the case, or statements in respect to the cause of the trouble, or in respect to past experience with it; neither can he express an opinion which he bases on such history or statements as to past experience.<sup>2</sup>

But it has been held that a physician may testify to a statement or narrative given by a patient in relation to his condition, symptoms, sensations and feelings, both past and present, when such statements were received during, and were necessary to an examination with a view to treatment, or when they are necessary to enable him to give his opinion as an expert witness.<sup>3</sup> Moreover, it has been held that the opinion of the physician and the patient's accompanying statements are admissible, although

<sup>1</sup> *State v. Gedicke*, 43 N. J. L. 86; *Illinois Central R. R. Co. v. Sutton*, 42 Ill. 438; *Cornelison v. Commonwealth*, 84 Ky. 593; *Mayo v. Wright*, 63 Mich. 32; *Harris v. Detroit City Railway Co.*, 76 Mich. 227.

<sup>2</sup> *A. T., etc. R. R. Co. v. Frazier*, 27 Kan. 463; *Heald v. Thing*, 45 Me. 392; *The People v. Murphy*, 101 N. Y. 126, 131. In *Insurance Co. v. Mosley*, 8 Wall. 397, 405, the court say: "The declarations of the party himself are received to prove his condition, ills, pains, and symptoms, whether arising from sickness, or an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. But to whomsoever made, they are competent evidence. \* \* It must relate to the present and not the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations, as furnish evidence of a *present* existing pain or malady." And see *Towle v. Blake*, 48 N. H. 92; *Taylor v. Railway*, 48 N. H. 305; *Hyatt v. Adams*, 16 Mich. 180, 200; *Johnson v. McKee*, 27 Mich. 471; *Elliott v. Van Buren*, 33 Mich. 49; *United States v. Faulkner*, 35 Fed. Rep. 730.

<sup>3</sup> *The Cleveland, etc. R. R. Co. v. Newell*, 104 Ind. 264, 271 (1885); *Yeatman v. Hart*, 6 Humph. (Tenn.) 374; *Looper v. Bell*, 1 Head (Tenn.), 373. In *Yeatman's* case, *supra*, the court say: "The physician says the history of the disease is a necessary element in determining its nature and character. That this is true, the observation and common sense of every man will confirm." See also *Ecles v. Bates*, 26 Ala. 655.

the examination of the patient and the statements were made *after* the commencement of the action and not wholly with a view of receiving medical treatment.<sup>1</sup> And there also is authority for saying that statements made to the experts by the patient are admissible, although made in the course of an examination voluntarily applied for after suit commenced, and which examination was had with no other purpose in view than that the examining physician should thereby become qualified to testify as a witness.<sup>2</sup> But upon this question the authorities are in conflict. Thus, it has been held in the Supreme Court of Michigan, that exclamations of pain were properly excluded from evidence, when they were made at a medical examination, conducted after the controversy arose, and with no view to medical treatment but for the purpose of obtaining testimony.<sup>3</sup> In that case the court say: "It is not necessary to consider whether there may not be properly received, in some cases, the natural and usual expressions of pain made under circumstances free from suspicion, even *post litem motam*. The case must at least be a very plain one which will permit this." This case has been followed in the Supreme Court of Connecticut, where such evidence was held "clearly inadmissible."<sup>4</sup>

Of course a physician will not be allowed to testify

<sup>1</sup> The Cleveland, etc. R. R. Co. v. Newell, 104 Ind. 264, 271.

<sup>2</sup> Kent v. Town of Lincoln, 32 Vt. 592 (1860); Matteson v. New York Central R. R. Co., 35 N. Y. 487, 491 (1866); State v. Gedicke, 43 N. J. Law, 86 (1881).

<sup>3</sup> Grand Rapids, etc. R. R. Co. v. Huntley, 38 Mich. 537, 545.

<sup>4</sup> Darrigan v. New York, etc. R. R. Co., 52 Conn. 285, 309, where the court say: "If otherwise easy facilities would be furnished for parties to introduce in evidence their own declarations, made out of court, not under oath, and where the temptation to exaggerate, and even to utter untruths, would be pretty strong."



as to statements made to him, in the absence of the plaintiff, by the latter's attending physician, concerning the character of an injury sustained by the plaintiff.<sup>1</sup> And statements by a party as to the manner of his injury, not necessary to diagnose his case, cannot be given in evidence by an attending physician any more than they could be by a non-professional man.<sup>2</sup>

§ 48. **Opinions as to the Condition of a Patient.**—A physician may give his opinion as to the actual condition of a patient whom he has visited,<sup>3</sup> or whose symptoms and condition have been described by others.<sup>4</sup> He may state his belief that a woman had been delivered of a child within three or four days, and state his opinion as to the condition of her mind at the time of giving birth to the child.<sup>5</sup> And he may state what effect certain drugs would have upon a person in a particular condition.<sup>6</sup> But it has been held that he cannot be asked his opinion, from the condition of a person whom he has not seen, as described by witnesses whose testimony was conflicting, whether the attention of a physician was necessary.<sup>7</sup> He may be asked whether an ascertained condition of suffering or bad health might have been caused by a previous injury.<sup>8</sup>

<sup>1</sup> *City of Goshen v. England*, 119 Ind. 368.

<sup>2</sup> *Dundas v. City of Lansing*, 75 Mich. 499.

<sup>3</sup> *Bush v. Jackson*, 24 Ala. 273; *Bennett v. Fail*, 26 Ala. 605; *Knox v. Wheelock*, 56 Vt. 200; *Spear v. Hiles*, 67 Wis. 367; *Myers v. State*, 84 Ala. 11.

<sup>4</sup> *Livingston v. Commonwealth*, 14 Gratt. 592; *Cooper v. State*, 23 Texas, 336, 340.

<sup>5</sup> *State v. Matthews*, 66 N. C. 113.

<sup>6</sup> *Hoard v. Peck*, 56 Barb. (N. Y.) 202, 210. That the opinions of physicians are admissible as to the ordinary effect of medicines, see also *Cooper v. State*, 23 Texas, 336, 340; *Batten v. State*, 80 Ind. 394.

<sup>7</sup> *Wilkinson v. Mosely*, 30 Ala. 562.

<sup>8</sup> *Turner v. City of Newburgh*, 109 N. Y. 301.

§ 49. **Opinions as to Cause of Death.**—The opinions of physicians are also received as to the cause of the death of any particular person; such opinion being founded either upon a personal knowledge of the facts of the case, or upon a statement of the symptoms of the disease as detailed by others.<sup>1</sup> If such opinions were not received, it would be impossible in many cases to prove the cause and manner of death, especially in those cases where there was no one present at the time of death. In such cases the opinions of physicians and surgeons who have made a *post-mortem* examination of the deceased, seem to be necessary in order to ascertain the facts and clear up the mystery. An experienced physician has been allowed to give his opinion that deceased was dead before a certain train passed over the body.<sup>2</sup> On the trial of an indictment for infanticide, where there were no marks of violence on the dead child, a physician has been allowed to testify that there were several modes of causing death without leaving upon the body any evidence of the means employed.<sup>3</sup>

A medical expert has been allowed to give in evidence his opinion whether a still-born child could have been born alive if medical assistance had been received in time.<sup>4</sup> He may state his opinion that death was caused by drowning.<sup>5</sup> And where the

<sup>1</sup> *Pitts v. State*, 43 Miss. 472; *State v. Bowman*, 78 N. C. 509; *Shelton v. State*, 34 Tex. 666; *State v. Baptiste*, 26 La. Ann. 134, 137; *State v. Smith*, 32 Me. 370; *Mitchell v. State*, 58 Ala. 418; *State v. Pike*, 65 Me. 111, 114; *Polk v. State*, 36 Ark. 117, 124; *Powell v. State*, 13 Texas Ct. of App. 244; *Boyle v. State*, 61 Wis. 440; *Newton v. The State*, 21 Fla. 56; *People v. Barker*, 60 Mich. 277; *People v. Foley*, 64 Mich. 148; *Schneider v. Manning*, 121 Ill. 376.

<sup>2</sup> *The State v. Clark*, 15 S. C. (N. S.) 403.

<sup>3</sup> *State v. Morgan*, 95 N. C. 641.

<sup>4</sup> *Telegraph Co. v. Cooper*, 71 Texas, 507.

<sup>5</sup> *People v. Hare*, 57 Mich. 506; *People v. Barker*, 60 Mich. 277.

attending physicians were dead at the time of trial, it was held competent for the wife of the deceased to state the declarations made to her at the time by the physicians as to the cause of death. The declarations made by them were in the ordinary line of their professional duty, and as such were receivable in evidence to establish the fact that they entertained such opinion as they stated.<sup>1</sup>

In a case in Arkansas, where the subject of inquiry was as to the cause of death, the court considered the mode of examination which should be pursued in such cases. The case was one of alleged poisoning, and it was held not erroneous to ask a physician to describe the symptoms of strychnine in the human system, and stop and allow the jury to compare the symptoms testified to by the witness with those given by the expert, as to the usual effects of strychnine, as affording some tendency to prove the manner of death. "But," said the court, "although not erroneous, such a course of examination is eminently unsatisfactory, and liable to mislead. The proper course is to take the opinion of the expert upon the facts given in evidence, not as to the merits of the case, or the guilt or innocence of the prisoner, but as to the cause of the death, so that the jury may first determine whether any crime has been committed by any one at all."<sup>2</sup>

In a case, where it was objected that the physician who made the *post-mortem* examination of the deceased could not express an opinion that death resulted from concussion of the brain, unless he had opened the head and examined the brain, the court

<sup>1</sup> *McNair v. National Life Ins. Co.*, 20 N. Y. Sup. Ct. 146. See, too, *Stephen's Dig. of Evidence*, Art. 27, p. 33.

<sup>2</sup> *Polk v. State*, 36 Ark. 117, 124.



said: "We are aware of no law that required him to open the skull and examine the brain before he could be permitted to express such an opinion to the jury. Of course, the opinion of a medical witness in such case would have more or less weight with the jury, according to the extent of the examination, the professional rank and character of the witness."<sup>1</sup>

§ 50. **The Nature and Symptoms of Disease.**—The opinions of witnesses skilled in the science and practice of medicine, are admissible as to the nature of the disease a person is afflicted with,<sup>2</sup> and as to how long he has probably been afflicted with it.<sup>3</sup> Their opinions are also received as to the severity and ordinary duration of the disease,<sup>4</sup> as well as to the probability of its recurrence,<sup>5</sup> and the effects upon the general health.<sup>6</sup> They are also permitted to testify as to the cause of the disease and the remedy for it,<sup>7</sup> and to describe the symptoms of any particular

<sup>1</sup> *Ebos v. The State*, 34 Ark. 520.

<sup>2</sup> *Napier v. Ferguson*, 2 P. & B. (New Bruns.) 415; *Polk v. State*, 36 Ark. 117, 124; *Tatum v. Mohr*, 21 Ark. 354; *Hook v. Stovall*, 26 Ga. 704; *Flynt v. Bodenhamer*, 80 N. C. 205, 208; *Jones v. White*, 11 Humph. (Tenn.) 268; *Pidcock v. Potter*, 68 Pa. St. 342, 344; *Lush v. McDaniel*, 13 Ired. (N. C.) 485; *Washington v. Cole*, 6 Ala. 212; *Linton v. Hurley*, 14 Gray (Mass.), 191; *Cooper v. State*, 23 Tex. 336, 340; *State v. Terrill*, 12 Rich. (S. C.) 321.

<sup>3</sup> *Lush v. McDaniel*, 13 Ired. (N. C.) 485; *Bennett v. Fail*, 26 Ala. 605; *Edington v. Ætna Life Ins. Co.*, 77 N. Y. 564, 568; *Tatum v. Mohr*, 21 Ark. 354; *Eckles v. Bates*, 26 Ala. 655.

<sup>4</sup> *Linton v. Hurley*, 14 Gray (Mass.), 191; *Willey v. Portsmouth*, 35 N. H. 303, 308; *Jones v. Utica*, etc. R. R. Co., 40 Hun (N. Y.), 349.

<sup>5</sup> *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42; *Tozer v. N. Y. Central R. R. Co.*, 38 Hun (N. Y.), 100.

<sup>6</sup> *Pidcock v. Potter*, 68 Pa. St. 342, 344; *Flynt v. Bodenhamer*, 80 N. C. 205, 208; *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42; *Anthony v. Smith*, 4 Bos. (N. Y.) 503.

<sup>7</sup> *Matteson v. N. Y. etc. R. R. Co.*, 62 Barb. (N. Y.) 364; *Jones v. Tucker*, 41 N. H. 546; *Newton v. State*, 21 Fla. 56; *Schneider v. Manning*, 121 Ill. 376; *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459,

disease,<sup>1</sup> explaining its characteristics,<sup>2</sup> and that it is contagious.<sup>3</sup> An attending physician may be asked whether he ever saw any appearance of a certain disease in the family of a particular person,<sup>4</sup> and whether before a certain injury he considered the person to be a hearty and vigorous man;<sup>5</sup> and he may state his opinion that a person's ill-health resulted from a certain injury.<sup>6</sup> A physician may testify as to the extent of certain injuries,<sup>7</sup> whether the injury is permanent or not,<sup>8</sup> the probability of recovery,<sup>9</sup> or the probable results of the injury.<sup>10</sup>

In a case in New York, in which it is held that experts may testify as to future consequences which are expected to follow an injury, it is laid down that to authorize such evidence the apprehended conse-

468; *Cooper v. State*, 23 Tex. 336, 340; *Napier v. Ferguson*, 2 P. & B. (New Bruns.) 415; *Magee v. City of Troy*, 48 Hun (N. Y.), 383; *Brant v. City of Lyons*, 60 Iowa, 172.

<sup>1</sup> *Welch v. Brooks*, 10 Rich. (S. C.) 124; *State v. Terrill*, 12 Rich. (S. C.) 321; *United States v. McGlue*, 1 Curtis C. C. 1, 9; *Napier v. Ferguson*, 2 P. & B. (New Bruns.) 415; *Pitts v. State*, 43 Miss. 472; *People v. Robinson*, 2 Parker Cr. Cas. (N. Y.) 236; *Lake v. People*, 1 Parker Cr. Cas. (N. Y.) 495.

<sup>2</sup> *Jones v. White*, 11 Humph. (Tenn.) 268; *Washington v. Cole*, 6 Ala. 212.

<sup>3</sup> *Moore v. State*, 17 Ohio St. 521, 526.

<sup>4</sup> *Morrissey v. Ingham*, 111 Mass. 63.

<sup>5</sup> *Sanderson v. Nashua*, 44 N. H. 492.

<sup>6</sup> *Louisville, etc. R. R. Co. v. Shires*, 108 Ill. 617; *Jones v. Utica, etc. R. R. Co.*, 40 Hun (N. Y.), 349; *Matteson v. N. Y. Central R. R. Co.*, 35 N. Y. 487, 492.

<sup>7</sup> *A., T. & S. F. R. R. Co. v. Frazier*, 27 Kan. 463.

<sup>8</sup> *Buel v. N. Y. Central R. R. Co.*, 31 N. Y. 314, 320; *Filer v. N. Y. Central R. R. Co.*, 40 N. Y. 42, 46; *Peoria, etc. R. R. Co. v. Berry*, 17 Brad. (Ill.) 47; *Magee v. City of Troy*, 48 Hun (N. Y.), 383; *Noblesville, etc. R. R. Co. v. Gause*, 76 Ind. 142; *City of Goshen v. England*, 119 Ind. 368; *Turner v. City of Newburgh*, 109 N. Y. 301.

<sup>9</sup> *Griswold v. N. Y. Central R. R. Co.*, 115 N. Y. 61.

<sup>10</sup> *Louisville, etc. R. R. Co. v. Lucas*, 119 Ind. 583, 592; *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459, 467; *Lincoln v. Saratoga, etc. R. R. Co.*, 23 Wend. 425; *Abbott v. Dwinnell*, 74 Wis. 514.

quences must be such as in the ordinary course of nature are reasonably certain to ensue, and that consequences which are contingent, speculative, or merely possible, cannot be proved.<sup>1</sup> An attending physician who observed his patient's symptoms may state whether such patient suffered any pain.<sup>2</sup> But one not an expert could testify to that point.<sup>3</sup> And a physician may state whether, in his opinion, a person's arm had been broken.<sup>4</sup>

§ 51. **Medical Testimony Relating to Wounds.**—In law the term "wound" is usually considered to mean a breach of the skin, or skin and flesh, by external violence. The testimony of physicians and surgeons on the subject is often of the very greatest importance. For instance, an important question frequently arising is whether a certain wound was inflicted before or after death. While in the case of incised wounds inflicted immediately after death the resemblance is so close to wounds inflicted immediately before death that the two cases are not distinguishable, yet if a few hours elapsed either before or after death before the infliction of the wound, medical testimony can reveal the fact. If the wound was inflicted after death the edges of the wound are usually found in close opposition, there is comparatively little effusion of blood, little or no coagula around the wound, and no evidence of repair.<sup>5</sup> And so in the case of gunshot wounds it is possible to say whether the discharge took place near the body, in which case the injured tissues would be more or

<sup>1</sup> *Strohm v. N. Y. etc. R. R. Co.*, 96 N. Y. 305. See this case explained in *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459, 467.

<sup>2</sup> *Chicago, etc. R. R. Co. v. Martin*, 112 Ill. 16.

<sup>3</sup> See section 4.

<sup>4</sup> *Johnson v. Central R. R. Co.*, 56 Vt. 708.

<sup>5</sup> See *Ewell's Med. Jour.*, p. 31.



less scorched, blackened or studded with grains of powder, as well as the entrance wound larger, ragged and excavated. So it is possible to show whether a wound was caused by a bullet at full speed, which perforates or penetrates, or whether at lessened speed, which crushes and lacerates. And so it may be shown whether a wound was produced by a sharp instrument drawn across the part, in which case the edges would be straight; or whether it was produced by a blunt instrument, in which case the edges would be more or less serrated or irregular. Many other illustrations might be given to show the importance of this class of testimony, if it were necessary to do so. We will, however, proceed to a consideration of the principles of law which have been established in reference to this class of testimony.

§ 52. **Who are Competent to Testify on the Subject of Wounds.**—1. If the witness is a physician or surgeon he is not incompetent to express an opinion, because of his want of observation of any case like the one in question.<sup>1</sup> Accordingly a physician or surgeon who had never seen a wound made with a knife or dirk has been held competent to express an opinion that the wound in question was made with a dirk.<sup>2</sup> In a similar case a similar ruling was made, the court declaring that the want of observation of exactly such a case as the one in question did not affect the competency of the witness, though it might lessen the credit given to his testimony.<sup>3</sup>

2. And in accordance with a principle elsewhere

<sup>1</sup> See sections 18 and 19.

<sup>2</sup> *Mendum v. Commonwealth*, 6 Rand. (Va.) 704.

<sup>3</sup> *State v. Clark*, 12 Ired. (N. C.) 151, 155.

stated<sup>1</sup> it is not necessary to qualify a medical witness to testify as an expert on the subject of wounds, that he should have actually seen the wound in question. His testimony may be based upon a description of the wound given in court by those who saw it.<sup>2</sup>

3. We have seen that medical witnesses have been held competent to testify as experts concerning wounds even though they may be without personal experience of like cases. On the other hand witnesses who are not physicians or surgeons, but who have had experience with wounds of a like nature, have been held, in some cases, incompetent to give expert testimony upon the subject. Thus, a witness who stated that he was acquainted with the difference in appearance between gunshot wounds and wounds made with a knife or sharp instrument, and that his knowledge was derived from experience and observation, has been held incompetent to express an opinion whether the wound in question, which he had seen, had the appearance of a gunshot or pistol-shot wound, or of having been made "with a knife or sharp instrument."<sup>3</sup> In a case where a witness stated that he was not a physician or surgeon, but had been an officer in the war and had seen the range of balls in a good many gunshot wounds, it was held that he was incompetent to testify how the balls ranged.<sup>4</sup> It has been held that a non-professional witness, who had seen the wounded person, could describe the wound as inflamed and tender to the touch, and could testify that such per-

<sup>1</sup> See section

<sup>2</sup> *State v. Powell*, 7 N. J. Law, 295; *Page v. State*, 61 Ala. 16.

<sup>3</sup> *Caleb v. The State*, 39 Miss. 721.

<sup>4</sup> *Rash v. State*, 61 Ala. 89.

son complained of stiffness in the fingers, and in the neck and in the jaws, that since the injury the witness had observed that the wounded man could not use his arm as he could before.<sup>1</sup> And in general it may be said that an ordinary witness is competent to describe the appearance of a wound which he has seen.<sup>2</sup> But while he may give the description of the wound he is incompetent to say how "it appears to have been made,"<sup>3</sup> or to express an opinion as to the direction from which the blow came.<sup>4</sup> And the opinion of an eye-witness that a fatal blow was accidental is inadmissible.<sup>5</sup>

A gunsmith who for years had studied and experimented to ascertain how far guns and muskets would carry shot compactly, and who stated that he could tell how far a person killed by a charge of shot from a musket must have been from the musket when it was fired, was held competent to testify to that fact as an expert.<sup>6</sup> On the trial of one indicted for murder where a witness testified that he had made certain experiments upon a dynamometer, an instrument for measuring the force of blows and the weight of falling bodies, by striking it with a bat of substantially the same form and weight as that with which the government contended the murder was committed, it was held that the court might, in its discretion, properly reject such testimony, unless the experiments were shown to have been made under

<sup>1</sup> *Craig v. Gerrish*, 58 N. H. 513.

<sup>2</sup> *The People v. Hong Ah Duck*, 61 Cal. 387; *McKee v. The State*, 82 Ala. 32. And see section 4.

<sup>3</sup> *State v. Cross*, 68 Iowa, 180.

<sup>4</sup> *McKee v. The State*, 82 Ala. 32.

<sup>5</sup> *State v. Vines*, 93 N. C. 493. And in this case it was also held improper to ask the question of a medical man.

<sup>6</sup> *State v. Jones*, 41 Kan. 309.



conditions the same as those existing in the case on trial.<sup>1</sup>

§ 53. **What Testimony is Admissible Concerning Wounds.**—1. It is well settled that medical experts may give an opinion as to the means by which a wound was inflicted.<sup>2</sup> Thus a practicing physician or surgeon may be asked his opinion as to the kind of instrument used in inflicting wounds,<sup>3</sup> as whether a wound was produced with a blunt or a sharp instrument;<sup>4</sup> and whether the fractures on the skull of the deceased, produced in court, were caused by blows from a gun shown to the witness;<sup>5</sup> also whether the skin of a person's throat had been cut by a sharp instrument, or torn.<sup>6</sup> It has been held proper to show that the corner of a hatchet's edge, if held by a person standing in front of the deceased while he was on his feet, exactly fitted the hole in the skull.<sup>7</sup> A surgical expert who had examined the wound, has been allowed to testify, whether, from its form and appearance, it could have been produced by a razor;<sup>8</sup> and whether certain injuries to the head could have been produced at the same time, and by one blow;<sup>9</sup> also whether the wounds could have been inflicted accidentally;<sup>10</sup> and whether the wound

<sup>1</sup> Commonwealth v. Piper, 120 Mass. 185.

<sup>2</sup> Williams v. The State, 64 Md. 384, 392; Territory v. Eagan, 3 Dak. 119.

<sup>3</sup> Davis v. State, 38 Md. 15, 35; State v. Porter, 34 Iowa, 131; State v. Chec Gong, 17 Oreg. 638.

<sup>4</sup> State v. Morphy, 33 Iowa, 272.

<sup>5</sup> Gardner v. People, 6 Parker Cr. Cas. 155.

<sup>6</sup> State v. Clark, 12 Ired. Law (N. C.), 152.

<sup>7</sup> Colt v. People, 1 Parker Cr. Cas. 611, 620.

<sup>8</sup> State v. Knight, 43 Me. 1, 130. And see Batten v. The State, 80 Ind. 394, 400, where an expert was allowed to say whether intestines were cut by a knife.

<sup>9</sup> Commonwealth v. Piper, 120 Mass. 185.

<sup>10</sup> Davis v. State, 38 Md. 15, 37.

could have been produced by coming in contact with a body of hard material, where there were no sharp angles or points.<sup>1</sup> A physician and surgeon of experience with gunshot wounds, may testify whether a wound was inflicted by a shot from a gun,<sup>2</sup> and he may explain to the jury why the wound looks smaller than the ball which caused it.<sup>3</sup> Medical experts are competent to testify, from the appearance of a wound through the hand, whether or not it was made while the hand was pressed over the muzzle of a revolver.<sup>4</sup> And they may testify as to the deadly character of the weapon used in the perpetration of a homicide;<sup>5</sup> and whether a certain instrument, would, in the hands of a man of ordinary strength, and used as a bludgeon, produce the wounds described and be likely to cause death.<sup>6</sup> In a case where there were two cuts through the under lip of the deceased made by her lower teeth, the prosecution claiming that they were caused by the pressure of the lower lip while the prisoner was smothering her, the defense claiming that they might have been made by the deceased while in a spasm, a physician was allowed to say whether they could have been made in the absence of some cause outside of another than the deceased herself.<sup>7</sup>

It has been held to be improper to ask an expert what caused a wound, the proper form of the question being to ask what might have caused it.

<sup>1</sup> *State v. Pike*, 65 Me. 111, 114.

<sup>2</sup> *Rash v. The State*, 61 Ala. 90; *Colt v. The People*, 1 Parker's Cr. Cas. 611, 620.

<sup>3</sup> *Schlencker v. The State*, 9 Neb. 250.

<sup>4</sup> *State v. Cross*, 68 Iowa, 180.

<sup>5</sup> *Banks v. The State*, 13 Texas Ct. of App. 182.

<sup>6</sup> *Waite v. The State*, 13 Texas Ct. of App. 169.

<sup>7</sup> *People v. Willson*, 109 N. Y. 345.

What caused a wound is a fact for the jury, and not mere matter of opinion.<sup>1</sup> In accordance with this principle in a case where counsel after stating hypothetically the condition of the body of the deceased, the character of the wounds, and other matters, asked the witness, who was a physician, how the wounds were probably made, the evidence was held rightly excluded. The court said: "It sought for an expression of opinion based upon matters which were to be weighed and considered by the jury, and determined by the exercise of their own judgments, and not upon the opinion of another. The matters upon which the question was based were not peculiarly within the knowledge of the witness or of the profession to which he belonged."<sup>2</sup> A similar ruling was had in a case in Texas when the following question was propounded to a physician: "What is your opinion, from the examination you made of the body, as to how the injury you saw, to-wit: the arm broken, the neck broken and the skull crushed, was done?" This question was objected to because "it called for the opinion of the witness as an individual, and not as an expert; was mere speculation on the part of the witness, and was matter about which the jury were as competent to judge as the witness." The trial court overruled the objection, but the Court of Appeal held that the objection should have been sustained upon the grounds urged.<sup>3</sup>

2. Medical experts may express an opinion as to

<sup>1</sup> *People v. Hare*, 57 Mich. 505.

<sup>2</sup> *State v. Rainsberger*, 74 Iowa, 196, 204.

<sup>3</sup> *Steagald v. State*, 24 Tex. Ct. of App. 207, 214.



the natural and probable result of wounds,<sup>1</sup> and as to whether they were sufficient to cause death.<sup>2</sup> Thus, a medical witness may testify that a wound was necessarily mortal.<sup>3</sup> And such a witness may testify that he should expect a greater injury from a direct blow, than from a glancing one.<sup>4</sup> And in a case where a person has been bitten in the thumb by the defendant a medical expert who had examined the wound has been allowed to state the tendency or danger of that kind of wound.<sup>5</sup> Medical experts have been allowed to give their opinion as to whether the effects of the wound are permanent in their nature,<sup>6</sup> and as to the probable effect of the wound on the general health of the injured person, whether in consequence of it he is liable to any particular disease.<sup>7</sup> The opinion of an expert has been received as to which of two wounds, either by itself necessarily fatal, actually caused the death of the deceased;<sup>8</sup> and as to the amount of force required to break a person's skull, his opinion being based on his familiarity with anatomy, and his knowledge of

<sup>1</sup> *People v. Willson*, 109 N. Y. 345, 353; *Williams v. State*, 64 Md. 384; *Curry v. State*, 5 Neb. 412; *State v. Porter*, 34 Iowa, 131; *Page v. State*, 61 Ala. 16; *Kline v. K. C., St. J. etc. R. Co.*, 50 Iowa, 656, 660; *State v. Stoyell*, 70 Me. 360; *Louisville, etc. R. R. Co. v. Lucas*, 119 Ind. 583.

<sup>2</sup> *Waite v. The State*, 13 Texas Ct. of App. 169; *State v. Powell*, 7 N. J. Law, 295; *Livingston v. Commonwealth*, 14 Gratt. (Va.) 592; *State v. Morphy*, 33 Iowa, 272; *Ebos v. State*, 34 Ark. 520; *State v. Jones*, 68 N. C. 443; *State v. Matthews*, 66 N. C. 113.

<sup>3</sup> *Batten v. The State*, 80 Ind. 394, 399.

<sup>4</sup> *Powers v. Mitchell*, 77 Me. 361.

<sup>5</sup> *Rinehart v. Whitehead*, 64 Wis. 42, 44.

<sup>6</sup> *Wilt v. Vickers*, 8 Watts (Pa.), 227; *Rowell v. City of Lowell*, 11 Gray (Mass.), 420; *Noblesville, etc. R. R. Co. v. Gause*, 76 Ind. 142; *Maer v. Third Avenue R. R. Co.*, 47 N. Y. Superior Ct. 461.

<sup>7</sup> *Montgomery v. Town of Scott*, 34 Wis. 338.

<sup>8</sup> *Eggler v. The People*, 56 N. Y. 642.

the structure, thickness and strength of the human skull generally.<sup>1</sup>

3. Medical experts may express an opinion as to the time when a wound was inflicted.

Thus, they may express an opinion as to whether a wound was inflicted before or after death.<sup>2</sup> And they have been allowed to testify whether the fracture of a skull had been recently made, in a case where the body was found six months after the person's disappearance.<sup>3</sup>

4. A physician may give his opinion as to the direction from which a blow was delivered. Thus a witness who had made a *post-mortem* examination of the body, and had stated that it enabled him to form an intelligent opinion on the subject, testified that the blow was delivered from behind and above the head of the person struck, and from the left towards the right.<sup>4</sup> And it has been held proper to ask a physician the following question: "Assuming that the jury should believe that the prisoner and deceased were about the same height, and that the pistol was fired by the prisoner in the manner and position testified to by the State's witnesses; what, in your opinion, would have been the range of the shot after entering the skull, taking into consideration the bone, muscles and other substances in the head?"<sup>5</sup> It has, however, been held that a physi-

<sup>1</sup> Kennedy v. People, 39 N. Y. 245.

<sup>2</sup> State v. Harris, 63 N. C. 1; Shelton v. State, 34 Texas, 666; People v. Willson, 109 N. Y. 345, 353; People v. Hare, 57 Mich. 506.

<sup>3</sup> Lindsay v. The People, 63 N. Y. 143.

<sup>4</sup> Hopt v. Utah, 120 U. S. 431. And see State v. Jones, 68 N. C. 443; Territory v. Eagan, 3 Dak. 119. But see McKee v. The State, 82 Ala. 32, 35.

<sup>5</sup> State v. Keene, 100 N. C. 509. And see Commonwealth v. Lenox, 3 Brewster, 249.

cian or surgeon is not competent to express an opinion as to the position of the body when the blow was struck.<sup>1</sup> And it has been held improper to ask a witness, who was a physician, how the wounds upon the defendant were probably made. The court said: "The matter upon which the question was based were not peculiarly within the knowledge of the witness or of the profession to which he belonged."<sup>2</sup>

For the purpose of explaining and rendering his evidence intelligible to the jury, an expert may be allowed, in describing wounds, to make use of plates and diagrams, although not claimed to be strictly accurate, and not intended to be used as evidence.<sup>3</sup>

In the trial of a person indicted for murder, counsel for the prisoner insisted that experts should have been summoned to show that the wound inflicted was dangerous, or mortal, or caused death. The court held that no such testimony was necessary, as it appeared that the deceased was a strong and apparently healthy man, who took to his bed immediately after the wound, suffered intensely for two days, and then died.<sup>4</sup>

§ 54. **Detection of Poison by Experts.**—In England, in 1530, the offense of poisoning was made high treason, and offenders were excluded from benefit of clergy and were to be boiled to death. This was not alone due to the fact that of all species of death that by poison was considered the most detestable as being of all others the most difficult to

<sup>1</sup> Kennedy v. The People, 39 N. Y. 245, 256.

<sup>2</sup> State v. Rainsbarger, 74 Iowa, 196, 204.

<sup>3</sup> State v. Knight, 43 Me. 1, 130.

<sup>4</sup> State v. Murphy, 9 Nev. 394.



prevent by courage or forethought, but it was because, in the state of knowledge that then existed, it was impossible, by chemical analysis, to determine the presence of the poisonous substance in the human body. At the present time, however, there is thought to be no poison accessible to the public which cannot be detected by modern methods of research,<sup>1</sup> although it may not be possible to find it actually present in the body in all cases. The time within which it is possible to detect the presence of the poison in the body depends, of course, on the nature of the poison employed. In the case of metallic poisons there is probably no limit to the time within which, after the demise of the patient, their presence may not be discovered. Some of the vegetable poisons, on the other hand, are so volatile that in a short time they entirely disappear. Thus a standard medical writer declares of prussic acid: "Assuming that a small but fatal dose has been administered, and that the dead body has been exposed or buried for a few weeks, it is not probable that any of the poison would be found by chemical analysis. The odor may entirely disappear in a week, and the longest period at which the poison itself has been found in the body is seventeen days."<sup>2</sup> The same writer also gives instances of poisoning by opium, when it has been impossible to find a trace of meconic acid or of morphine in the contents of the stomach. And he states that "it may be set down as the exception to the rule to find this poison in the dead body."<sup>3</sup> On the other hand, arsenic has been de-

<sup>1</sup> 1 Cr. Law Mag. 294, article by R. Ogden Doremus, M. D., LL.D.

<sup>2</sup> Taylor on Poisons, p. 603.

<sup>3</sup> *Ibid.* p. 554.

tected ten years after the death of the victim.<sup>1</sup> But it is not always necessary to find poison in the body to determine that death was caused by poison. That fact may appear from the symptoms preceding death, and from the appearance of the body and the condition of the organs.<sup>2</sup>

Experts are, of course, allowed, after having made a chemical analysis, to testify as to the presence of poison in the stomach or internal organs of the body.<sup>3</sup>

When it is claimed that death resulted from the administration of poison, the expert testimony may be both chemical and medical. But an expert in one of these branches is not necessarily an expert in the other.<sup>4</sup>

<sup>1</sup> *Ibid.* 374.

<sup>2</sup> "It is now a well known and admitted fact, that a person may die from poison, and no poison be found by chemical analysis in the body. There is a popular but erroneous notion that, if poison cannot be produced from a dead body in a visible and tangible form, then, supposing proper skill to have been employed, the only inference to be drawn is, that no poison was taken, and that death was caused by disease. This would be bringing the question of death from poison to a very simple issue indeed. It would be casting aside physiology and pathology, and requiring our law authorities to place entire and exclusive confidence in the crucible and test-tube of the chemist, \* \* \* the allegation that no person can die from poison, except the poison be found in the body, is a mockery, a delusion and a snare, admirably adapted to cover a multitude of secret deaths from poison, which, but for this dogma, might be revealed by pathology and physiology. It is all the more dangerous, because the history of crime shows us that the arts of the murderer, especially of the scientific or professional murderer, are daily becoming more refined. I might add largely to the list of poisons which either by their nature, by their tremendous power in very small doses, or by the mode in which they are introduced into the system, would infallibly produce death without leaving a physical or chemical trace of their presence in the body." Taylor on Poisons, p. 170.

<sup>3</sup> *State v. Bowman*, 78 N. C. 509, 510.

<sup>4</sup> *People v. Millard*, 53 Mich. 63, 74.

§ 55. **Who are Experts in the Detection of Poisons.**—1. A chemist who has made an analysis of a substance may testify as to its ingredients.<sup>1</sup>

2. A chemist and toxicologist, although he is not a physician or surgeon, can testify as to the effect of a certain poison on the human system.<sup>2</sup>

3. A physician may testify as to the effect of certain poisons on the human system.<sup>3</sup>

For example, he may testify as to the symptoms which appear upon the administration of any particular poison.<sup>4</sup> And he may state that in his opinion death was caused by the administration of poison.<sup>5</sup> In the case last cited the physician, after describing the symptoms, gave his opinion that death resulted from arsenic, but that he would not have formed such an opinion had he not been informed there was arsenic in the house; that learning that fact he reached his conclusion from observation of the symptoms of the case.

4. The right of a physician to testify as to the result of a chemical analysis has been recognized,<sup>6</sup> but the mere fact that he is a physician does not alone qualify him to give evidence as an expert, when the question is as to the contents of the human stomach as revealed by a *post-mortem* examination with the view of ascertaining the presence of arsenic.<sup>7</sup>

§ 56. **Chemical Analysis of Poison not Necessary, When.**—It is held that it is not always essential that

<sup>1</sup> Commonwealth v. Hobbs, 140 Mass. 443; Commonwealth v. Kendrick, 147 Mass. 444.

<sup>2</sup> The State v. Cook, 17 Kan. 392.

<sup>3</sup> The State v. Terrill, 12 Rich. (S. C.) 321.

<sup>4</sup> People v. Robinson, 2 Parker's Cr. Cas. 236; Polk v. State, 36 Ark. 117, 124.

<sup>5</sup> Mitchell v. State, 58 Ala. 418.

<sup>6</sup> State v. Hinkle, 6 Iowa, 380.

<sup>7</sup> State v. Cole, 63 Iowa, 695. And see section 57.



there should be a chemical analysis of a mixture, in order to qualify an expert to express an opinion as to its ingredients, and to its being a poison.<sup>1</sup> In the case cited, which was the trial of a prisoner indicted for administering a poisonous drug, a bottle was produced and shown to a medical expert which contained the mixture administered by the defendant; he stated that he had made no chemical analysis of its contents, but thought he could tell its ingredients from its smell, taste and appearance. He was allowed to give an opinion as to what the mixture was composed of, its effect upon a woman in pregnancy when taken, and the danger to life.

§ 57. **Chemical Analysis of Contents of Stomach.**

—In a case of poisoning, chemical tests and an analysis of the contents of the stomach and bowels are, as a rule, essential to the ascertainment of the truth, and should be resorted to in cases where there is no direct proof of the act. Symptoms of themselves, without other circumstances are said to be unreliable, and to afford inconclusive evidence of guilt.<sup>2</sup> There are cases in which it is very difficult, and even impossible to discriminate with certainty during life between poisoning and ordinary disease, and with few exceptions the morbid appearances left by poison upon a corpse do not differ essentially from those that attend natural diseases, or some kinds of violent death. The most satisfactory evidence of poisoning, therefore, consists in the isolation of some particular poison from the tissues, or from the secretion or matter ejected from the body. In cases of suspected poisoning, the chem-

<sup>1</sup> State v. Slagh, 83 N. C. 630.

<sup>2</sup> Joe v. The State, 6 Fla. 591.

ical analysis should, if possible, be made by an experienced chemist rather than by a general medical practitioner.

But in cases where the opinions of experts are to be received as to the chemical contents of the stomach and bowels, there should be preliminary proof of the identity of the stomach and its contents and that the same have not been improperly tampered with. Such proof should be submitted, and passed upon by the court, before the opinions of the experts are received.<sup>1</sup> But in a case where an expert chemist was allowed, over objection, to testify as to the result of his examination of the contents of a stomach which had been submitted to him for analysis, before this preliminary proof had been made, it was held that no error had been committed, such proof having been afterwards submitted. At the time the objection was raised counsel had stated that he would afterwards establish by a witness not then in the court-house, the identity of the contents of the stomach analyzed as the stomach of the deceased.<sup>2</sup>

It is, of course, necessary that the evidence should show that the stomach taken from the deceased was the identical stomach whose contents were analyzed, and that no foreign substance could have been introduced into the stomach, or into its contents, subsequent to the death of the deceased and prior to the chemical analysis. But it is not necessary that the stomach should be kept continuously under lock and key from the time it is taken from the body of the deceased until the final

<sup>1</sup> The State v. Cook, 17 Kan. 394.

<sup>2</sup> Johnson v. The State, 20 Texas Ct. of App. 178.

analysis, or that it should be kept continuously sealed up. And it is not necessary that all *possibility* of its being tampered with should be excluded.<sup>1</sup>

Not only may the testimony of professional chemists be received, but the opinions of practicing physicians who are not professional chemists, have been received as to the analysis of the stomach, and the tests usually applied for detecting poison in such cases. Although the opinions of those who are not practical chemists are entitled to less weight than those given by that class of experts whose conclusions are based upon experience as well as books.<sup>2</sup>

§ 58. **Order of Research in Analysis for Poison.**—In the analysis of a poison it is essential that the toxicologist should have followed a scientific order of research, as otherwise it is quite possible for him to fail to discover the presence of the poison. It is important for counsel in the examination of such witnesses to bear this fact in mind, and we, therefore, append this order of research. The examination should be:

<sup>1</sup> See *State v. Cook*, 17 Kan. 392, 395.

<sup>2</sup> *State v. Hinkle*, 6 Iowa, 380. In this case the opinions of two practicing physicians were received. One of them stated that he was not a professional chemist, but understood some of the practical details of chemistry—that portion at least which belonged to his profession; that he had no practical experience in the analysis of poisons until he analyzed the contents of the stomach of the deceased; that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way. The other declared that he was not a practical chemist, but understood the chemical tests by which the presence of poison could be detected; that he had never experimented with the view of detecting strychnine by chemical tests, but that he had seen experiments by professors of chemistry, and that there was one test much relied on, the trial of which he had witnessed. And see section 55.



1. For the volatile poisons, such as hydrocyanic acid, chloroform, ether, etc. These poisons being most liable to escape detection, as they may be lost by evaporation.

2. For the vegetable poisons, such as strychnine, morphia, belladonna, etc., as the tests employed for the detection of mineral poisons are often destructive of the vegetable poisons.

3. For the various acids, alkalies, metallic poisons, etc.<sup>1</sup>

§ 59. **Expert Testimony on the Subject of Blood.**

—When marks of blood are found on the clothing or weapons of an accused person, it is not unusual to find him accounting for the same with a claim that he has been engaged in butchering cattle, killing a pig, or handling game. In such cases it becomes important to know the character of the blood for the purpose of determining, if possible, the truth or falsity of his explanation.

It appears that the fluid of the blood contains a large number of corpuscles. Science counts and measures them, and it is commonly held that the blood of an adult man contains 5,000,000 red corpuscles in each cubic millimetre. The average diameter of the human red corpuscle is still a subject of discussion. Gulliver, however, states that the average size in both sexes is  $\frac{1}{3200}$ ths of an inch, while Taylor states it to be  $\frac{1}{3500}$ ths of an inch. Welcker, a recognized authority on the continent, gives .00774 m m. as the average breadth in the human male, and Elsberg, nearly agreeing with Welcker, fixes the mean diameter of the red corpuscle at .0075 m m. Human corpuscles are then to

<sup>1</sup> See 1 Cr. Law Mag. 309.

be compared with the corpuscles of the animals. Gulliver gives the average in the dog as  $\frac{1}{3540}$ ; in the hare as  $\frac{1}{3607}$ ; in the mouse  $\frac{1}{3614}$ ; in the ass  $\frac{1}{4000}$ ; in the pig  $\frac{1}{4230}$ ; in the ox  $\frac{1}{4267}$ ; in the cat  $\frac{1}{4400}$ ; in the horse  $\frac{1}{4600}$ ; in the sheep  $\frac{1}{5300}$ ; in the goat  $\frac{1}{6386}$ . Satterthwaite, a recent writer on histology, gives the following averages: Dog, .0073 m m.; cat, .0065 m m.; rabbit, .0069 m m.; sheep, .0050 m m.; goat, .0041 m m.; elephant, .0094 m m.; pigeon, .0147 m m.; chicken, .0121 m m.; duck, .0129 m m. It will be seen that there is little variation between the corpuscles of human blood and those of the dog, the cat and the rabbit; while there is a considerable variation between it and that of the elephant, the pigeon, the chicken and the duck.<sup>1</sup>

It is possible, therefore, for science in some cases to show whether the story of the accused is true or not. How valuable the testimony may be will depend on the circumstances of the particular case—on the blood to be compared—and on the manner in which the expert has done his work. On this latter point attention may properly be called to the following extract from a recognized authority on histology:

“Measurements of single corpuscles have no value in determining the particular animal from which the blood has been obtained, and this is an object of prime importance in medico-legal cases. It is common, therefore, to make a hundred or more single measurements, and then take the average of them. And yet this figure may vary considerably in different individuals, or even in the same one. In the blood

<sup>1</sup> See Satterthwaite's *Manual of Histology*, ch. III; Taylor's *Med. Jur.* p. 307.

of the puppy, for instance (the size of the dog's corpuscle being very nearly that of a man's), a recent observer found that the average diameter of fifty corpuscles varied only two millionth of an inch from a like average of fifty taken from his own blood. In another instance, taking forty from a puppy, he found that the average differed only seven millionth of an inch from a similar average of his own."<sup>1</sup>

Again, an important element seems to be whether the blood measured was recent or dried. And another writer on this subject says:

"When blood is dried on clothing, and it is necessary to extract the corpuscles by means of a liquid of a different nature from the serum, we cannot rely on slight fractional differences, since we cannot be sure that the corpuscles, after having been once dried, will ever acquire, in a foreign liquid, the exact size which they had in serum. Medical evidence must, therefore, be based, in such cases, on mere speculation. \* \* \*

There are no *certain* methods of distinguishing microscopically, or chemically, the blood of a human being from that of an animal, when it has been once dried on an article of clothing."<sup>2</sup>

Persons accustomed to make chemical and microscopic examination of blood and blood stains, are, of course, allowed to testify whether human blood can be distinguished from animal blood, and, if so, whether a particular blood stain was made by human or animal blood.<sup>3</sup> Such evidence has been received in numerous cases, and without objection.

<sup>1</sup> Satterthwaite's *Manuel of Histology*, p. 36.

<sup>2</sup> Taylor's *Med. Jur.* p. 307.

<sup>3</sup> See *Commonwealth v. Sturtivant*, 117 Mass. 122, 124; *State v. Knight*, 43 Me. 1, 133; *Knoll v. The State*, 55 Wis. 249.



An expert may illustrate his testimony touching the properties of human blood, as ascertained by chemical tests and microscopic observation, by the use and exhibition to the jury of a diagram. "It would be very difficult for an expert of the most accurate and extensive observation, to exhibit in language with precision, so as to be understood, those delicate appearances which are appreciable only by the sense of vision. Nothing short of an exact representation to the sight can give with certainty a perfectly correct idea to the mind. \* \* \* A diagram approximating in any degree to perfect representation, when exhibited by one qualified from knowledge and experience to give explanations, may do much to make clear his testimony without danger of misleading."<sup>1</sup>

In a criminal trial it would seem to be proper that the prisoner should be allowed to have the articles, which the prosecution allege to be smeared with blood, examined by his own experts. After such articles have been offered in evidence by the government, they are placed in the special custody of the court, to be dealt with as justice requires. Then, if the prisoner desires an examination to be made by his experts, it should be allowed under proper precautions. As Mr. Justice LUDLOW has expressed it, "the court should see to it that they are guarded from intentional or accidental injury, with the most scrupulous care, and they may be examined in open court by any persons selected by the prisoner or his counsel, or if, from necessity, the examination cannot be made accurately in open court, they should be placed in the hands of any respect-

<sup>1</sup> The State v. Knight, 43 Me. 1.

able chemist or physician to be selected by the prisoner, with the consent of the court. They should be properly identified as the very articles offered in evidence by the Commonwealth before they are delivered to the person who has been selected by the prisoner's counsel, and for this purpose, that person should receive them in open court, and they should then be examined in the presence of an officer or officers of the court.'"<sup>1</sup>

§ 60. **Whether Ordinary Witnesses may Testify as to Blood Stains.**—But it has been made a question in several cases, whether ordinary witnesses may testify as to blood stains, it being objected that no one but a chemist is qualified to state whether stains, apparently made by blood, are really blood stains or not. We cannot find that such an objection has been sustained in a single instance. And the rule is, that ordinary witnesses are competent to testify that they observed spots of blood upon the clothing, etc., and no chemical analysis of the substance supposed to be blood is necessary.<sup>2</sup> “The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal. \* \* Either party in the present case had the right to resort to microscopic or chemical tests, but neither was bound to do it, and neither can complain of the other for the omission. \* \* The affairs of life are too pressing and manifold to have everything reduced to absolute certainty, even

<sup>1</sup> Commonwealth v. Twitchell, 1 Brewster (Pa.), 562.

<sup>2</sup> Dillard v. State, 58 Miss. 368, 386; People v. Greenfield, 30 N. Y. Sup. Ct. 462; s. c., 85 N. Y. 75. People v. Deacons, 109 N. Y. 374.

in the administration of justice. \* \* Microscopes, chemists and men of science are not always at hand, and criminals are neither anxious to court observation, nor careful to preserve the evidences of their guilt."<sup>1</sup> But the question whether the blood is human blood or the blood of an animal, would seem to be one of science requiring the testimony of experts.<sup>2</sup>

§ 61. **Blood Stains—Proper Question Concerning.**—It is sometimes very important to determine whether blood stains upon clothing were occasioned by blood flowing upon the outer, or upon the inner surface of the fabric. If caused by blood flowing directly upon the outer surface of the fabric, the coloring matter of the blood, which is suspended in the blood, will, of course, remain on the outer surface, whereas it would be on the inner surface of the garment if it came from within. It is held, therefore, that one who is qualified by chemical observations and experiments, may testify whether a blood spot upon a garment could have been occasioned by blood flowing directly upon the outer surface thereof.<sup>3</sup> And an expert may testify as to the direction from which a blood stain came, as, for instance, that it came from below upwards.<sup>4</sup> But in a case in Mississippi, where it was proposed to ask the experts to give their opinions as to the relative positions of the combatants at the time of the difficulty, as indicated by blood upon the shirt, with a view of showing by the blood marks that the prisoner was probably prostrate on the ground, and

<sup>1</sup> *People v. Deacons*, 109 N. Y. 374.

*People v. Ganzalez*, 35 N. Y. 49, 61.

<sup>2</sup> *State v. Knight*, 43 Me. 1, 133.

<sup>4</sup> *Commonwealth v. Sturtivant*, 117 Mass. 122.



deceased on top of him when the stains on the shirt were received, the question was excluded upon the ground that it did not involve any matter of science or skill, and that the jury must judge for themselves.<sup>1</sup>

§ 62. **Miscellaneous Cases in which the Opinions of Chemists have been Received.**—A chemist has been permitted to testify as to the safety of camphene lamps.<sup>2</sup> In this case the witness was held competent to express an opinion as to the safety of the lamp, although he had never experimented with lamps, or made or used camphene, or paid any particular attention to camphene lamps, but it appeared that he had studied chemistry with a distinguished chemist; that he was himself an instructor in chemistry, and acquainted with gases, having experimented with them, and also knew how camphene was made. And in an action which involved the question whether a certain fertilizer was merchantable and reasonably suited to the use intended, the opinion of a chemist, who had made an analysis of the fertilizer, was considered competent evidence, although not conclusive as to the suitability of the fertilizer for the use intended.<sup>3</sup> So in an action to recover damages for injury to land by working a copper mill producing noxious gases, from which poisonous substances are discharged, the testimony of experts has been received, showing that they had made experiments with gases taken from the land,

<sup>1</sup> Dillard v. State, 58 Miss. 368, 387.

<sup>2</sup> Bierce v. Stocking, 11 Gray (Mass.), 174.

<sup>3</sup> Wilcox v. Hall, 53 Ga. 635. See, too, Gossler v. Eagle Sugar Refinery, 103 Mass. 331, that certain sugar contained 3 per cent. of sand.

by means of which they had obtained copper.<sup>1</sup> The testimony of a chemist has been received, that the point of drainage of surrounding lands by a filter basin, on land taken for that purpose, could be determined, and it has been held proper to ask him whether the level had been determined by experiment, at which water stood under soil generally, and that he could state the results of experiments made by him in his laboratory in proving that fact.<sup>2</sup> A chemist might properly be asked as to the probability of spirits evaporating while undergoing transportation in certain casks.<sup>3</sup> The opinions of chemists are, of course, received as to the constituent parts of a compound.<sup>4</sup> We have elsewhere considered the admissibility of the opinions of chemists as to the nature of inks, and the age of writing, in cases involving the genuineness of handwriting.<sup>5</sup>

§ 63. **Expert Testimony on the Subject of Hair.**—The question whether certain hair is human hair or not sometimes becomes a question of great importance on trials for homicide. The opinion of a microscopist would certainly be received as to whether the hair in question was human or not. And a witness possessing no special qualifications has been allowed to express such an opinion.<sup>6</sup>

A trial occurred about 1850 at Norwich, England, the circumstances of which are given as follows: “A female child, nine years old, was found lying on the ground in a small plantation, quite dead, with

<sup>1</sup> *Lincoln v. Taunton Manuf. Co.*, 9 Allen (Mass.), 182. See, too, *Salvin v. North Brancepeth Coal Co.*, 9 Ch. App. (L. R.) 705.

<sup>2</sup> *Williams v. Taunton*, 125 Mass. 34.

<sup>3</sup> *Turner v. The Black Warrior*, 1 McAlister, 181, 184.

<sup>4</sup> *Allen v. Hunter*, 6 McLean, 303, 310.

<sup>5</sup> See Chapter VI.

<sup>6</sup> *Commonwealth v. Dorsey*, 103 Mass. 412.

a large and deep gash in the throat. Suspicion fell upon the mother of the murdered girl, who, upon being taken into custody, behaved with the utmost coolness, and admitted having taken her child to the plantation where the body was found, whence the child was lost in quest of flowers. Upon being searched, there was found in the woman's possession a large and sharp knife, which was at once subjected to a minute and careful examination. Nothing, however, was found upon it, with the exception of a few pieces of hair adhering to the handle, so exceedingly small as scarcely to be visible. The examination being conducted in the presence of the prisoner and the officer remarking, 'Here is a piece of fur or hair on the handle of your knife,' the woman immediately replied, 'Yes, I dare say there is, and very likely some stains of blood, for as I came home I found a rabbit caught in a snare, and I cut its throat with a knife.' The knife was sent to London, and, with the particles of hair, subjected to a microscopic examination. No trace of blood could at first be detected upon the weapon, which appeared to have been washed: but upon separating the horn handle from its iron lining it was found that between the two a fluid had penetrated which turned out to be blood—certainly not the blood of a rabbit, but bearing every resemblance to that of the human body. The hair was then submitted to examination. Without knowing anything of the facts of the case, the microscopist immediately declared the hair to be the hair of a *squirrel*. Now, round the neck of the child at the time of the murder there was a tippet or 'victorine,' over which the knife, by whom-



ever held, must have glided, and this victorine was of *squirrel's fur*.

This strong circumstantial evidence of the guilt of the prisoner was deemed by the jury sufficient for a conviction, and whilst awaiting execution the wretched woman fully confessed her crime."<sup>1</sup>

In the famous Cronin case, recently tried in Chicago, expert testimony on the subject of hair was received, some of the experts affirming and others denying the possibility of determining that certain hair was human hair. If the microscopists of this country or of England have given much attention to the question whether it is possible to distinguish human hair from *all* other forms of hair, they have not made public, so far as the writer knows, the result of their investigation.

§ 64. **Expert Testimony in Malpractice Cases.**—

The law requires a physician or surgeon, who accepts an employment to treat a patient professionally, to exercise such reasonable care and skill as is ordinarily possessed and exercised by physicians or surgeons in good standing, of the same system or school of practice, in the locality of his practice.<sup>2</sup> If he fails to perform this duty he is liable for his failure or neglect. To constitute a school of medicine under this rule, it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case. If the practitioner practices without such a system of fixed principles or formulated rules, he does

<sup>1</sup> Richardson's Medical Microscopy, 295. And see appendix.

<sup>2</sup> Bowman v. Woods, 1 Green (Iowa), 441; Patten v. Wiggan, 51 Me. 595.

not belong to "a school of medicine," and he is held to the duty of treating his patient with the ordinary skill and knowledge of physicians in good standing who practice in his vicinity.<sup>1</sup> Whether a physician has in a given case adopted the proper treatment is a question on which the opinions of medical men of the same school may be received in evidence, and they may state whether in their opinion the treatment was proper or not,<sup>2</sup> whether it was in conformity with the rules and practice of the profession.<sup>3</sup> In a case in Wisconsin it was decided that a physician might be asked the following questions: "Suppose his statement relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment of the patient proper or improper? And in your opinion, was or was not the death of the patient the result of any neglect or want of skill in the surgeon?"<sup>4</sup> An expert in medicine can be asked whether the defendant "gave the case such attention as it demanded," and whether there was "any unskillful management" on the part of the defendant.<sup>5</sup> The defendant in such a case has been allowed to testify that the surgeon who assisted him to perform the act of surgery complained of was skillful.<sup>6</sup> It is not necessary that the opinion of the

<sup>1</sup> *Nelson v. Harrington*, 72 Wis. 591.

<sup>2</sup> *Wright v. Hardy*, 22 Wis. 348; *Hoener v. Koch*, 84 Ill. 408; *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376; *Heath v. Glisan*, 3 Oregon, 67; *Roberts v. Johnson*, 58 N. Y. 613, 615; *Mayo v. Wright*, 63 Mich. 32.

<sup>3</sup> *Twombly v. Leach*, 11 Cush. (Mass.) 405.

<sup>4</sup> *Wright v. Hardy*, 22 Wis. 348, 353.

<sup>5</sup> *Olmsted v. Gere*, 100 Pa. St. 127. In this case it was also held proper for a physician to express the opinion that a limb was or was not as good as the average condition of such cases treated by skillful physicians.

<sup>6</sup> *Jones v. Angell*, 95 Ind. 376.

expert in a malpractice case should be asked upon any particular part of the treatment, but taking the whole treatment together he may be asked whether it "was proper or improper."<sup>1</sup> And a physician who attended a patient who had been under the care of another physician, can testify as to what, so far as he could judge, had been the first physician's treatment; in what respects it differed from his own; what effect, so far as he could judge, it had upon the plaintiff, and whether or not he saw any evidence that the plaintiff had been injured by his treatment.<sup>2</sup>

§ 65. **Expert Testimony in Cases of Rape.**—Science claims that by the use of the microscope in the investigation of stains upon clothing supposed to be caused by spermatic fluid, as in cases of rape and indecent assault, it can often throw much light upon the guilt or innocence of persons accused of these offenses. The following account taken from a recognized authority is of interest in this connection:

"In a case upon which I was consulted some time since, where a young girl was said to have been violated by main force and held down for some minutes subsequently, the chemise worn on the occasion was brought to me for examination. On inspection, besides sundry small reddish spots and streaks upon the front, there were to be seen two large stains on either side of the middle of the back of the garment, each about four inches long by three inches wide, such as might occur from any fluid running down the inside of the thighs from the vulva of a female lying upon her back in a nearly horizontal posture. My first duty being obviously

<sup>1</sup> Mayo v. Wright, 63 Mich. 32.

<sup>2</sup> Barber v. Merriam, 11 Allen (Mass.), 322.



to determine whether these reddish stains were produced by blood, the chemise was doubled over at the most highly tinted part of one spot, and the convex portion of the fold scraped lightly with a sharp scalpel over a clean side until a small quantity of fine reddish dust was obtained. This powder was covered with thin glass, and, a drop of water being applied to one edge, and a fragment of bibulous paper to the other, a current of fresh fluid was kept up for about one minute when the specimen was examined with a power of 1,200 diameters. \*

\* \* These cellular elements became more clearly visible when slightly tinted with aniline, and on measurement with the micrometer were found to average about  $\frac{1}{600}$  and  $\frac{1}{500}$  of an inch in diameter respectively, whence I concluded that the red stains were produced by blood, probably that of a human being. \* \* \* The main question, as to the presence or absence of spermatozoa, still continuing unsolved, as none had been detected among the particles of blood-clot, a fragment of muslin about three-fourths of an inch long by one-eighth an inch wide, selected from a portion where the fabric, although but little stained was a good deal stiffened by the suspected material, was cut out with a pair of curved scissors, and, after soaking for a couple of minutes in a drop or two of weak glycerine and water, its inner surface was gently scraped and pressed with a scalpel, the visible filaments of cotton picked out with a mounted needle, the remainder covered with a very thin glass and subjected to examination under \* \* a power of about 2,800 diameters. Several indubitable spermatozoa \* \* were readily detected, and proved beyond all ques-

tion that spermatic fluid, mingled with blood, had caused the stains upon the chemise."<sup>1</sup>

There have been a number of cases of rape before the courts in which questions have been raised concerning expert testimony. The use of the microscope is not the only method which science has of throwing light upon such inquiries, as the following cases will show.

On the trial of an indictment for the rape of a child, the opinion of a physician that there has been actual penetration is admissible.<sup>2</sup> And upon such trials medical experts may be examined as to the health and physical condition of the prosecutrix at the time of the alleged offense, as bearing upon her ability to resist the defendant.<sup>3</sup> But it has been held incompetent to ask such witnesses the following questions: "From what you know of her health and strength, in your opinion could the defendant have had carnal connection with her against her will, without resort to other means than the exercise of his ordinary physical powers?" And whether, in

<sup>1</sup> Richardson's Medical Microscopy, 299, 300. Dr. Caspar, in his Hand-book of the Practice of Forensic Medicine, Vol. I., Sydenham Society's translation, London, 1861, says: "Inexperienced persons may no doubt be deceived by the presence of epithelial cells, the fibers of the linen, etc., but whoever has only once seen a single characteristic spermatozoon, dead or alive, can never be deceived again. I have recognized them even after the lapse of an entire year, and thereby determined the existence of a seminal stain. Bayard states that he has recognized them after three years, and Ritter even after four years, which is perfectly credible, presupposing always that the linen during that time has not been much rubbed or handled, because the forms of the zoosperms will be thereby destroyed." Frey in his Microscope and Microscopical Technology, p. 559, speaking of the procedure by which spermatozoa are to be detected, says: "Any spermatozoa which may be present will thus be discovered with certainty, and there is scarcely any possibility of mistaking them."

<sup>2</sup> State v. Smith, Phillips (N. C.) Law, 302.

<sup>3</sup> State v. Knapp, 45 N. H. 148.

the opinion of the witness, "a rape could be committed on a female who had borne children, and was in ordinary health and strength, without resort to other means than the exercise of ordinary physical powers."<sup>1</sup> It has been held proper for an expert to state what effect a rape would have on the sexual organs of the female, and to testify that upon an examination of the prosecutrix several days after an alleged rape, her sexual organs were found inflamed. But the witness cannot usurp the province of the jury, said the court in the case cited, by expressing the opinion that such inflammation "was produced by having a violent connection."<sup>2</sup>

Medical experts sometimes claim to be able to determine whether specimens of spermatozoa are really those of a man or are the testicular products of some animal, employed for the purpose of deception.<sup>3</sup>

<sup>1</sup> *Wooden v. People*, 1 Parker Cr. Cas. 464. And see *Cook v. State*, 24 N. J. L. 843.

<sup>2</sup> *Noonan v. The State*, 55 Mo. 258.

<sup>3</sup> "Under such circumstances accurate measurements would be very important, and since these differ in the different species of mammals, and still more in birds, fishes, etc., they would probably be conclusive. Of course, counsel propounding such a theory to account for a suspicious stain proved to contain spermatozoa, should rightfully be compelled to show some probability of access to the one of the inferior animals from which they could be presumed to be derived. Of these the more likely are perhaps the dog, whose spermatozoa, as figured by Rudolph Wagner (*Elements of Physiology*, translated by Robert Willis, M. D., London, 1844, p. 11), are about one-fourth larger than those of man, and have the body broadest at the extremity, instead of at the base; that of the rabbit, in which the body is nearly twice the size of the same part of a human spermatozoon, etc. The seminal animalcules of the monkey tribe closely resemble those of man, but are about one-half larger." Richardson's *Medical Microscopy*, p. 303; Dalton's *Human Physiology*, p. 458. The spermatozoa of the human subject are said to be about 1-600 of an inch in length, according to the measurements of Kolliker.



§ 66. **Expert Testimony in Cases of Abortion, Pregnancy and Seduction.**—The opinions of medical experts are received upon the question of whether an abortion has been performed,<sup>1</sup> and they are allowed to testify that certain medicines are known as abortives, and to state that it would be a dangerous thing to give certain drugs, in almost any dose, to a pregnant woman, and how large a dose would be required to produce an abortion.<sup>2</sup> And medical experts have been held competent to testify that certain surgical instruments found in the house of the defendant, indicted for an abortion, were adapted to produce an abortion.<sup>3</sup> A physician testifying as an expert that he discovered no traces of an abortion in a certain case was properly asked whether such traces would exist under certain circumstances, even though no proof of such circumstances had been made.<sup>4</sup> When the prosecutrix, in a prosecution for producing an abortion by a violent and unlawful assault, had testified to the violence used upon her, and to her subsequent delivery of a dead child, and the condition of its body, it was held that she was incompetent to testify that the abortion was the result of the violence, she being a non-expert.<sup>5</sup>

It has been held that the parts of the person upon whom instruments were alleged to have been used for the purpose of procuring an abortion, and which had been preserved in alcohol, could be submitted

<sup>1</sup> *State v. Smith*, 32 Me. 370; *State v. Wood*, 53 N. H. 484, 495.

<sup>2</sup> *Regina v. Still*, 30 Upper Canada (C. P.), 30.

<sup>3</sup> *Commonwealth v. Brown*, 121 Mass. 69.

<sup>4</sup> *Bathrick v. Detroit, etc. Co.*, 50 Mich. 629.

<sup>5</sup> *Nevarro v. State*, 24 Tex. App. 378.

to the jury in connection with the testimony of the physician who made the *post-mortem* examination.<sup>1</sup>

Physicians are permitted to express an opinion upon the question of pregnancy.<sup>2</sup> A medical witness has been allowed to testify that pregnancy was just as likely to take place in case of rape as in the case of a voluntary sexual connection.<sup>3</sup> But a witness who has had no peculiar experience and possesses no peculiar skill, is not competent to express an opinion as to pregnancy.<sup>4</sup>

In a prosecution for seduction the opinion of medical experts has been held admissible, who testified to the effect that it was highly improbable, if not impossible for intercourse to have occurred under the circumstances described by the complainant (*i. e.*, in a buggy); and also as to the pain and suffering the complainant would have experienced had such an act taken place.<sup>5</sup> And it has been held that a woman who had experience as a nurse in childbirth, and as such had been in attendance at premature births, might express an opinion as an expert as to whether the birth of a child was premature.<sup>6</sup> "The witness, by her experience and observation," said the court, "appears to have acquired knowledge of the subjects about which she was testifying, that persons generally do not have. To the extent of this peculiar knowledge she was a person of skill and science, and her opinion, founded upon it, was evidence to go to the jury."

<sup>1</sup> Commonwealth v. Brown, 14 Gray, 419.

<sup>2</sup> State v. Wood, 53 N. H. 484, 495.

<sup>3</sup> State v. Knapp, 45 N. H. 143, 152. And see Young v. Johnson, 46 Hun (N. Y.), 164.

<sup>4</sup> Boies v. McAllister, 12 Me. 308.

<sup>5</sup> People v. Clark, 33 Mich. 112.

<sup>6</sup> Mason v. Fuller, 45 Vt. 29.

§ 67. **Opinions of Non-Professional Witnesses as to Mental Condition.**—There seems to have been no dispute as to the right of the subscribing witnesses to a will, to testify concerning the actual mental condition of the testator, but their opinions have been received without question. The fact that they were present at the time the will was signed, makes them competent to speak upon the subject, whether they “happen to be the attending physicians, nurses, children, or chance strangers.”<sup>1</sup> And it does not seem to be necessary that they should state the facts upon which their opinions are predicated.<sup>2</sup> But a marked difference of opinion has existed as to the right of persons, who are neither the subscribing witnesses to the will, nor experts in mental diseases, to express any opinion whatever as to a person’s sanity or insanity, soundness or unsoundness of mind. It has been held in a number of cases, that the opinions of such witnesses cannot be received.<sup>3</sup> Such opinions have been excluded upon the theory, that special knowledge and skill are required to

<sup>1</sup> *Hardy v. Merrill*, 56 N. H. 227, 243; *Poole v. Richardson*, 3 Mass. 330; *Chase v. Lincoln*, 31 Mass. 237; *Needham v. Ide*, 5 Pick. 510; *Potts v. House*, 6 Ga. 324; *Van Huss v. Rainbolt*, 42 Tenn. 139; *De Witt v. Barley*, 9 N. Y. 371; *Williams v. Lee*, 47 Md. 321; *Boardman v. Woodman*, 47 N. H. 120, 134; *Grant v. Thompson*, 4 Conn. 203; *Wogan v. Small*, 11 S. & R. (Penn.) 141; *Rambler v. Tyron*, 7 S. & R. (Penn.) 90, 92; *Cilley v. Cilley*, 34 Me. 162; *Robinson v. Adams*, 62 Me. 369; *Logan v. McGinnis*, 12 Pa. St. 27; *Titlow v. Titlow*, 54 Pa. St. 216; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Holcomb v. Holcomb*, 95 N. Y. 316, 321.

<sup>2</sup> *Williams v. Lee*, 47 Md. 321; *Van Huss v. Rainbolt*, 42 Tenn. 139; *Potts v. House*, 6 Ga. 324.

<sup>3</sup> *Wyman v. Gould*, 47 Me. 159; *Hickman v. State*, 38 Tex. 191; *State v. Archer*, 54 N. H. 465; *Boardman v. Woodman*, 47 N. H. 120; *Commonwealth v. Fairbanks*, 2 Allen (Mass.) 511; *Townsend v. Pepperell*, 99 Mass. 40; *Hastings v. Rider*, 99 Mass. 624, 625; *Commonwealth v. Wilson*, 1 Gray, 337; *State v. Pike*, 49 N. H. 399; *Van Horn v. Keenan*, 28 Ill. 445, 449; *De Witt v. Barley*, 9 N. Y. 371; *State v. Geddis*, 42 Iowa, 268.



judge intelligently of the mental condition of another, and that if the witnesses give a detailed account of the acts and conduct of the person whose mental capacity is in question, the jury are as competent to form an opinion thereon as the witnesses themselves; that the opinions of professional witnesses may be received, as they can judge with some degree of accuracy, from pathological symptoms, but that the opinions of non-professional witnesses ought not to be received, as they can only form their opinions from the actual demonstrations of the person, and that those demonstrations ought to be stated to the jury, and that body left to form their own opinion as to the cause and character of the appearances described. The fact has come, however, to be recognized, that it is impossible so to describe the appearance and demonstrations of a person, as to convey any accurate idea of their exact character, and to leave upon the mind of jurors the legitimate impressions which such demonstrations and appearances naturally leave upon the mind of the actual observer. The result has been that many of the earlier cases have been overruled, and the principle has come to be generally recognized that non-professional witnesses may give their opinions as to sanity, as a result of their personal observation of the person whose mental condition is in question, after first stating the facts which they have observed.<sup>1</sup>

<sup>1</sup> *Carpenter v. Hatch*, 64 N. H. 573; *McRae v. Malley*, 93 N. C. 154; *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612; *Shaver v. McCarthy*, 110 Pa. St. 339; *Taylor v. Commonwealth*, 109 Pa. St. 262; *Grubb v. State*, 117 Ind. 277; *State v. Potts*, 100 N. C. 457; *Thomas v. State*, 40 Texas, 65; *Whitcomb v. State*, 41 Texas, 125; *McClackey v. State*, 5 Tex. Ct. of App. 320; *Webb v. State*, 5 Tex. Ct. of App. 596; *Hardy v. Merrill*, 56 N. H. 227; *Dennis v. Weeks*, 51 Ga. 24; *Choice v. State*, 31

But in New York the principle is still adhered to that laymen will not be allowed to express an opinion that a person was sane or insane, except in the case of subscribing witnesses. The rule in that State is that when a layman is examined as to facts within his own knowledge and observation, tending to show soundness or unsoundness of a person's mind, he may characterize as rational or irrational the acts and declarations to which he testifies, but while he can thus state the impression produced by what he wit-

Ga. 424, 466; *Berry v. State*, 10 Ga. 511; *People v. Sanford*, 43 Cal. 29; *Roe v. Taylor*, 45 Ill. 486; *Beller v. Jones*, 22 Ark. 92; *Clark v. State*, 12 Ohio, 483; *State v. Hayden*, 51 Vt. 296; *Crane v. Crane*, 33 Vt. 15; *Morse v. Crawford*, 17 Vt. 499; *Florey's Ex'rs v. Florey*, 24 Ala. 247; *Puryear v. Reese*, 46 Tenn. 21; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *People v. Finley*, 38 Mich. 482, 484; *Walker v. Walker*, 14 Ga. 242; *Fielder v. Collier*, 13 Ga. 496; *Dieken v. Johnson*, 7 Ga. 484; *Foster v. Brooks*, 6 Ga. 290; *Crowe Adm'r v. Peters*, 63 Mo. 429; *Sutherland v. Hawkins*, 56 Ind. 343; *Rush v. Megee*, 36 Ind. 69; *Hunt's Heirs v. Hunt*, 3 B. Monr. (Ky.) 577; *Rambler v. Tyron*, 7 S. & R. 90; *Wilkinson v. Pearson*, 23 Pa. St. 117; *McDougald v. McLean*, 1 Winston (N. C.) Law, 120; *Estate of Brooks*, 54 Cal. 471; *Williams v. Lee*, 47 Md. 321; *Dove v. State*, 50 Tenn. 348; *Waters v. Waters*, 35 Md. 531; *Pidcock v. Potter*, 68 Pa. St. 342; *State v. Newlin*, 69 Ind. 108; *State v. Klinger*, 46 Mo. 224; *Clary v. Clary*, 2 Ired. (N. C.) 78; *De Witt v. Barley*, 17 N. Y. 340; *Beaubien v. Cicotte*, 13 Mich. 459; *Kelly's Heirs v. McGuire*, 15 Ark. 555, 601; *Stewart v. Redditt*, 3 Md. 67; *Dorsey v. Warfield*, 7 Md. 65; *Brooke v. Townshend*, 7 Gill (Md.), 24; *Burnham v. Mitchell*, 34 Wis. 111; *Kilgore v. Cross*, 1 Fed. Rep. 582; *People v. Wreden*, 59 Cal. 392; *Pinney's Will*, 27 Minn. 280; *Pittard v. Foster*, 12 Ill. App. 132; *Upstom v. People*, 109 Ill. 169; *American Bible Society v. Price*, 115 Ill. 623; *Goodwin v. The State*, 96 Ind. 500; *Ryman v. Crawford*, 86 Ind. 262; *Turner v. Kansas City, etc. R. R. Co.*, 23 Mo. App. 13; *Bell v. McMaster*, 29 Hun (N. Y.), 272; *McLeary v. Morment*, 84 N. C. 235; *Barker v. Pope*, 91 N. C. 165; *Westmore v. Sheffield*, 56 Vt. 239; *Parkhurst v. Hosford*, 21 Fed. Rep. 827; *Chase v. Winans*, 59 Md. 475; *Appleby v. Brock*, 76 Mo. 314; *State v. Erb*, 74 Mo. 199; *Wood v. The State*, 58 Miss. 741; *Woodcock v. Johnson*, 36 Minn. 217; *Wise v. Foote*, 81 Ky. 10; *State v. Winters*, 72 Iowa, 627; *State v. Bryant*, 93 Mo. 273; *Campbell v. State*, 10 Tex. Ct. of App. 560; *Harris v. State*, 18 Tex. Ct. of App. 287, 294; *Johnson v. Culver*, 116 Ind. 278; *Keithley v. Stafford*, 126 Ill. 507; *Frizzell v. Reed*, 77 Ga. 724; *Fishburne v. Ferguson*, 84 Va. 87.

nessed, he is not competent to express an opinion on the general question whether the person's mind was sound or unsound.<sup>1</sup>

And in Massachusetts also the courts still exclude the opinions of ordinary witnesses as to mental soundness or unsoundness. In that State only experts and subscribing witnesses to wills are permitted to give opinions on questions of mental condition and capacity; and only persons of scientific training upon the subject and physicians are there regarded as experts.<sup>2</sup> But the courts in that State will not allow an ordinary witness to say whether, in his opinion, a person has failed mentally within a given time,<sup>3</sup> or whether the witness has noticed any want of coherence in another's remarks,<sup>4</sup> or whether the witness had ever observed any fact which led him to infer any derangement of intellect.<sup>5</sup>

In a case in Ohio the Supreme Court of that State ruled that the witness ought be asked what opinion he entertains at the time of the trial, and not as to the opinion which he entertained at the time of the acts referred to by him, inasmuch as subsequent reflection and consideration may have satisfied him that the opinion formed at the time of observation was erroneous.<sup>6</sup> And in Vermont the court

<sup>1</sup> *Clapp v. Fullerton*, 34 N. Y. 190; *O'Brien v. People*, 36 N. Y. 276; *Rea v. People*, 42 N. Y. 270; *Hewlett v. Wood*, 55 N. Y. 634; *Rider v. Miller*, 86 N. Y. 507; *In re Ross*, 87 N. Y. 514; *Holcomb v. Holcomb*, 95 N. Y. 316; *Matter of Klock*, 49 Hun (N. Y.), 450; *People v. Packenham*, 115 N. Y. 200.

<sup>2</sup> *Commonwealth v. Brayman*, 136 Mass. 438; *Cowles v. Merchants* 140 Mass. 377; *May v. Bradlee*, 127 Mass. 414; *Hastings v. Rider*, 99 Mass. 622.

<sup>3</sup> *Commonwealth v. Brayman*, 136 Mass. 438.

<sup>4</sup> *Barker v. Comins*, 110 Mass. 477.

<sup>5</sup> *May v. Bradlee*, 127 Mass. 414.

<sup>6</sup> *Runyan v. Price*, 15 Ohio St. 14.



held that, the fact that the witness did not form his opinion at the time he saw and observed the facts testified to by him, did not render his opinion on that account inadmissible.<sup>1</sup>

It must be conceded, we think, that the interests of justice require that ordinary witnesses should be allowed to express an opinion as to soundness of mind based on their personal knowledge and observation of the party's acts. The inquiry does not seem to be one so necessarily involving scientific evidence, as to be beyond the domain of common sense. And it is quite possible for non-professional witnesses to observe innumerable acts, motions and expressions, which it is impossible to communicate to others in such a way as to convey any fair conception of their importance, and which are, nevertheless, sufficient to conclusively satisfy the observer as to a person's mental condition. While such opinions are admissible, yet no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation in the witness, other than it has enabled him to form a belief or judgment thereon.<sup>2</sup>

When such opinions are received in evidence, the weight to be accorded to them is a question for the jury, who must determine whether the facts testified to by the witnesses as a basis for their opinions justified the opinions expressed.<sup>3</sup>

The opinions of ordinary witnesses as to mental condition, as in other cases when the opinions

<sup>1</sup> *Hathaway's Adm'r v. National Life Ins. Co.*, 48 Vt. 335.

<sup>2</sup> *Choice v. The State*, 31 Ga. 424, 467.

<sup>3</sup> *Taylor v. Commonwealth*, 109 Pa. St. 262; *Chase v. Winans*, 59 Md. 475; *Wood v. State*, 58 Miss. 741; *Wise v. Foote*, 81 Ky. 10; *McClackey v. State*, 5 Tex. Ct. of App. 331.

of such witnesses are received, are always based on their personal knowledge of the individual case, and never on the evidence of other witnesses, nor on a hypothetical case.<sup>1</sup>

In Texas, where ordinary witnesses, personally acquainted with the individual whose mental condition is the subject of inquiry, are allowed to express their opinion based on the facts they have observed, it has been held that the opinion of a non-professional witness based on his personal observation of the symptoms of kleptomania is admissible in evidence in connection with his testimony to the symptomatic facts on which his opinion rests. This conclusion was reached on the theory that the opinions of such witnesses were admissible as to mental unsoundness, and that kleptomania was a species of mental derangement.<sup>2</sup>

§ 68. **Expert Testimony as to Mental Condition.—**

1. No question is made anywhere but that medical men who are conversant with insanity, who have made a specialty of mental diseases, and had experience with the insane, are competent to express opinions as to mental condition, although they have not made any personal examination of the individual whose mental condition is in dispute. They can express an opinion in answer to hypothetical questions.<sup>3</sup>

2. The principle is likewise established that if a physician visits a person, and from actual examination or observation becomes acquainted with his

<sup>1</sup> Appleby v. Brock, 76 Mo. 314; State v. Erb, 74 Mo. 199. And see section 3, p. 8.

<sup>2</sup> Harris v. The State, 18 Tex. Ct. of App. 287.

<sup>3</sup> Commonwealth v. Rogers, 7 Met. (Mass.) 500; State v. Windsor, 5 Harr. (Del.) 512.

mental condition, he may give an opinion respecting such mental condition at that time, although the witness does not appear to have made any special study of mental diseases.<sup>1</sup>

As Mr. Chief Justice DILLON expressed it, in a case in Iowa: "There is no more reason why he may not do this, than why he might not testify that he saw a certain person at a certain time, and that he was then laboring under an epileptic fit, or under an attack of typhus fever, or had been stricken down and rendered unconscious by an apoplectic stroke."<sup>2</sup>

We have seen that ordinary witnesses are allowed to express opinions on this subject, when such opinions are based on their own observation and knowledge of the person whose mental condition is in question.<sup>3</sup> Where such opinions are received, surely no question can be made as to the right of a physician to express an opinion based on personal knowledge and observation of the party. But in Maine, where the opinions of non-professional witnesses are not admissible on the question, it is held that a physician who made a single examination of the person, and that to qualify himself as a witness in a pending litigation, was incompetent to express an opinion.<sup>4</sup>

3. But another question is presented when it is sought to obtain the opinion of the witness in answer to a hypothetical question, or upon the testimony of other witnesses, and not upon his personal observa-

<sup>1</sup> *Baxter v. Abbott*, 7 Gray (Mass.), 71; *State v. Felter*, 25 Iowa, 67, 75; *Heald v. Thing*, 45 Me. 392; *McAllister v. State*, 17 Ala. 435; *Potts v. House*, 6 Ga. 324, 335; *Hastings v. Rider*, 99 Mass. 622; *Pigg v. State*, 43 Texas, 111; *Lessee of Hoge v. Fisher*, 1 Pet. C. C. 164.

<sup>2</sup> *State v. Felter*, 25 Iowa, 67, 75.

<sup>3</sup> See section 67.

<sup>4</sup> *Fayette v. Chesterville*, 77 Me. 28.



tion of the case. A difference of opinion exists whether a physician is, because of his profession, competent to express an opinion not based on his personal knowledge of the case. Some cases seem to require that a physician should have made the subject of mental diseases one of special study and attention in order to give an opinion on a hypothetical case.<sup>1</sup> It has been decided recently, in Kentucky, that if a physician is able to state that he has, as a physician, studied the disease of insanity sufficiently well to give a medical opinion as to the disease and diagnose the case, he is a competent witness.<sup>2</sup>

But in some cases this special study does not appear to have been insisted on.<sup>3</sup>

A very interesting case was decided in the Supreme Court of California in 1880, which involved the question whether a Roman Catholic priest could express an opinion as to the sanity of a testator, such opinion being given by him in the character of an expert. The court, overruling the decision of the trial court, held that he was competent to testify as an expert. The evidence showed that he had been regularly educated for the priesthood in a college in Spain, that he had officiated as a priest for ten years, that it was part of his preparatory education to become competent to pass upon the mental condition of communicants in his church, and that for that purpose physiology and psychology were branches of his study. It appeared, said the court, "That previous to officiating as a priest it was

<sup>1</sup> See *Commonwealth v. Rich*, 14 Gray, 335; *Fayette v. Chesterville*, 77 Me. 33; *Russell v. State*, 53 Miss. 367.

<sup>2</sup> *Montgomery v. Commonwealth*, 11 S. W. Rep. 475.

<sup>3</sup> *Schneider v. Manning*, 121 Ill. 376; *Potts v. House*, 6 Ga. 324, 335; *Guetig v. State*, 66 Ind. 94, 104; *State v. Windsor*, 5 Harr. (Del.) 512, 542; *People v. Schuyler*, 106 N. Y. 298.

requisite that he should be skilled in determining the mental condition of those who sought the sacraments. That in every case of the administration of the rites of his church to invalids or dying persons, it was necessary for the priest to make an examination of the mental condition of the recipient, to ascertain if his mind was in a proper state to reason or act of its own volition. That the sacrament could only be administered after such a preliminary examination, and that therefore as a priest he was daily required to exercise and pass his judgment on the mental condition of persons.'"<sup>1</sup>

While a medical expert may state his opinion as to the sanity or insanity of a person, and may give the reason on which it is founded, yet it has been held that inferences from facts which are within the range of ordinary judgment and experience are to be drawn by the jury, and cannot be proved as facts by the opinion of the expert.<sup>2</sup>

§ 69. **Form of Question as to Mental Condition.**—We have elsewhere considered the mode of examination to be pursued in the case of expert witnesses.<sup>3</sup> The principles there stated are, of course, as applicable to the examination of experts in mental diseases, as to the examination of any other class of experts, and yet it may be well to make further reference to that subject in this connection. Witnesses may testify as to mental soundness and unsoundness, sanity or insanity, capacity for transacting business, and as to the vigor or strength of the mental powers. The weight of authority is, however, opposed to allowing the witness to express an

<sup>1</sup> Estate of Toomes, 54 Cal. 510.

<sup>2</sup> People v. Barber, 115 N. Y. 473.

<sup>3</sup> See Chapter III.

opinion as to whether an individual had the mental capacity to dispose of his property by will or deed.<sup>1</sup> When the question in issue is whether a person was possessed of testamentary capacity, the following form of question has been approved: "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed his will?"<sup>2</sup> The witness may also be asked for his opinion of the party's capacity to comprehend his property and make an intelligent disposition of it by will,<sup>3</sup> and as to his capacity to transact business.<sup>4</sup> But it has been held proper to decline to allow non-expert witnesses to testify as to their opinion of the mental condition of a testator on the day of the execution of his will, when they did not see him on that day. They could give their opinion of his condition when they last saw him before the will was made.<sup>5</sup> When the witness is allowed without objection to express an opinion as to a testator's capacity to make a will, and has been allowed to do this without stating the grounds for the opinion, the fact that the witness was not shown to have any correct understanding of the true criterion of testamentary capacity, constitutes no objection to a finding and judgment based on such testimony.<sup>6</sup>

In a case where the question involved was whether

<sup>1</sup> *Schneider v. Manning*, 121 Ill. 376, 386; *White v. Bailey*, 10 Mich. 155; *Kempsey v. McGinnis*, 21 Mich. 123; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 332; *Fairchild v. Bascom*, 35 Vt. 398; *Farrell v. Brennan*, 32 Mo. 328; *Pinney's Will*, 27 Minn. 280.

<sup>2</sup> See 1 *Jarman on Wills*, p. 51, and *McClintock v. Curd*, 32 Mo. 419.

<sup>3</sup> *Pinney's Will*, 27 Minn. 280, 282. And see *Melendy v. Spaulding*, 54 Vt. 517.

<sup>4</sup> *Woodcock v. Johnson*, 36 Minn. 217, 219.

<sup>5</sup> *Blake v. Rourke*, 74 Iowa, 519, 523.

<sup>6</sup> *Appleby v. Brock*, 71 Mo. 314.



an alleged imbecile had sufficient mental capacity to enable him to contract marriage, it was held to be within the discretion of the presiding judge to allow an expert to testify that the alleged imbecile was not capable of understanding his duties towards his wife arising out of the matrimonial union.<sup>1</sup>

In criminal cases, where insanity is set up as a defense, the expert may be asked his opinion as to the condition of the prisoner's mind—whether he was capable of distinguishing right from wrong—and, in States where the courts recognize it as an element of defense, whether he had sufficient reason to control the passions which prompted the act complained of. But unless the conclusion of the expert has been reached as the result of personal knowledge of the defendant himself, the opinion should be in answer to a hypothetical question.<sup>2</sup>

In a case in New York, a suggestion is made as to the proper mode of examining a medical witness on the subject of insanity. Counsel should first inquire of the witness as to particular symptoms of insanity, then ask whether all, or any, and which, of the circumstances spoken of by the witnesses upon the trial, are to be regarded as such symptoms, and then inquire what combination of these circumstances would, in the opinion of the witness, amount to proof of insanity.<sup>3</sup>

This plan seems preferable to a long hypothetical question, embracing many distinct facts assumed by counsel as established by the evidence, for the jury

<sup>1</sup> *St. George v. Biddeford*, 76 Me. 598.

<sup>2</sup> *McNaghten's Case*, 10 C. & F. 200, 212. See a quotation from the opinion delivered by Lord Chief Justice Tindale in this case, and which can be found on page 76 of this work.

<sup>3</sup> *People v. McCann*, 3 Parker's Cr. R. 272, 298.

may not be satisfied that all the facts have been established. And it is also preferable, for reasons elsewhere stated, to a question based on the assumption that everything stated by the witnesses is true.<sup>1</sup> Of course, if the expert has made a personal examination he can state his opinion as based on the examination.

§ 70. **Evidence Bearing on Question of Insanity.**—

The opinions of experts are received as to the causes tending to the development of mental unsoundness. For instance, the opinions of experts have been received showing that paralysis in old persons has a tendency to impair the mind.<sup>2</sup> As bearing upon the question of a person's insanity, or tendency to insanity, evidence is received that such person's father or mother were of unsound mind,<sup>3</sup> or that his uncle,<sup>4</sup> or brother,<sup>5</sup> or other relations suffered from mental disease.<sup>6</sup>

Evidence that a person was reported in the neighborhood in which he lived to be insane, is inadmissible.<sup>7</sup> But reputation in the family as to facts connected with the family is allowed to be shown as to

<sup>1</sup> See p. 61.

<sup>2</sup> Lord v. Beard, 79 N. C. 5.

<sup>3</sup> Coughlin v. Poulson, 2 McArthur, 308; Baxter v. Abbott, 7 Gray (Mass.), 71.

<sup>4</sup> Baxter v. Abbott, *supra*.

<sup>5</sup> Fraser v. Jennison, 42 Mich. 206, 228.

<sup>6</sup> People v. Montgomery, 13 Abb. Pr. (N. S.) 207, 250; State v. Windsor, 5 Harr. (Del.) 512.

<sup>7</sup> State v. Hoyt, 47 Conn. 518, 539. And so in Foster v. Brooks, 6 Ga. 287, 292, where the court say: "By this kind of evidence a fool may be proved a wise man, and a philosopher a fool. Public opinion declared Copernicus a fool, when he promulgated the planetary system, and Columbus a fool when he announced the sublime idea of a New World. Hazardous in the extreme would it be to the rights of parties under the law, if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals." See also Ashcraft v. De Armond, 44 Iowa, 229.

certain matters which could not be shown by proof of reputation in the neighborhood as to the same matters. It does not follow that in all cases where proof by neighborhood reputation is excluded that proof by reputation in the family will also be excluded. And while it has been held that reputation in the family of the insanity of its members is inadmissible,<sup>1</sup> yet it has been held on the other hand that reputation in the family of the insanity of some of the members of the family, is admissible on the same principle which admits such reputation as to deaths, births, genealogies, etc.<sup>2</sup> Unless such evidence could be introduced, it would be impossible, in many cases, to show the insanity of deceased members of the family.

But it is highly important that evidence should not be received as suggesting insanity, unless it has some legitimate tendency to prove it. "We are persuaded that much wrong has unwittingly been done in many cases, by allowing misfortunes, family calamities and personal peculiarities, to go to the jury as having some necessary tendency to unsettle the mind, and, therefore, some bearing on the issue of mental soundness."<sup>3</sup>

It is proper to inquire as to the person's state of mind, both before and after the time

<sup>1</sup> *Walker v. State*, 102 Ind. 502, 507. This case cites in support of its ruling cases which hold neighborhood reputation inadmissible on such a question. The only other case it cites is *Choice v. State*, 31 Ga. 423, where, without doubt, it was correctly decided that family and neighborhood reputation was not admissible to prove that the prisoner was permanently injured in his mind by reason of an injury in his mind which he had received. In such a case there could be no necessity for resorting to such proof, as the man was alive at the very time the inquiry was being made.

<sup>2</sup> *State v. Windsor*, 5 Harr. (Del.) 512.

<sup>3</sup> *Fraser v. Jennison*, 42 Mich. 206, 227.



concerning which the particular inquiry is directed.<sup>1</sup> "Upon the question of sanity at the time of committing an offense," says the Supreme Court of Massachusetts, "the acts, conduct and habits of the prisoner at a subsequent time, may be competent as evidence in his favor." But they are not admissible, as of course. When admissible at all, it is upon the ground, either that they are so connected with, or correspond to evidence of disordered or weakened mental condition preceding the time of the offense, as to strengthen the inference of continuance, and carry it by the time to which the inquiry relates, and thus establish its existence at that time; or else that they are of such a character as of themselves to indicate unsoundness to such a degree, or of so permanent a nature, as to have required a longer period than the interval for its production or development."<sup>2</sup>

It is admissible to give in evidence particular acts of madness.<sup>3</sup> But it is not competent to introduce the *doubt* of an expert as to a person's sanity.<sup>4</sup> And a record of the condition and treatment of a patient in a hospital, produced at a trial forty years after its date by the superintendent of the hospital, of which he is the official custodian, and which purports to have been contemporaneously made by the attending physicians, of all cases there

<sup>1</sup> *McAllister v. State*, 17 Ala. 434, 436; *McLean v. State*, 16 Ala. 672; *Grant v. Thompson*, 4 Conn. 203, 208; *Kinne v. Kinne*, 9 Conn. 102; *Norwood v. Morrow*, 4 Dev. & Batt. 442, 451; *State v. Felter*, 25 Iowa, 67, 75; *Lake v. People*, 1 Parker Cr. Cas. 495; *Freeman v. People*, 4 Denio, 9.

<sup>2</sup> *Commonwealth v. Pomeroy*, 117 Mass. 148. See, too, *White v. Graves*, 107 Mass. 325.

<sup>3</sup> *Clark v. Periam*, 2 Atk. 337, 340.

<sup>4</sup> *Sanchez v. People*, 22 N. Y. 147.

treated, and which it was their duty to make, has been held in Massachusetts to be admissible in evidence, as a foundation for the opinion of an expert as to whether it indicated mental disease of the patient, and that without identifying the person who made it.<sup>1</sup>

In a case where the sanity of a testatrix was questioned, and positive evidence of her insanity had been given, upon its being proved that she had a paralytic attack shortly before the execution of the will, it was held improper to prove by an expert that, in nine cases out of ten, paralysis did not produce any effect upon the mind.<sup>2</sup> If it had been shown that it in no case affected the mind the ruling would have been different.

§ 71. **Opinions Concerning the Discretion of a Person of Non-age.**—We have seen that the opinions of even non-expert witnesses are received in evidence on the question of sanity. And the question has been raised whether a like ruling should be made where the question arises whether a person of non-age is possessed of such a degree of discretion as to make him amenable to the criminal law. In a case in the Court of Appeals of Texas proof was made of the non-age of the accused at the time of the commission of the offense. It, therefore, became necessary for the State to prove affirmatively that the boy had sufficient discretion to understand the nature and the illegality of the act constituting the crime alleged. To do this the State placed witnesses on the stand who expressed the opinion that the accused was possessed of sufficient discretion to know that it was wrong and illegal to do the act complained of—

<sup>1</sup> *Townsend v. Pepperell*, 99 Mass. 40.

<sup>2</sup> *Lands v. Lands*, 1 Grant (Penn.), 248.

that he knew right from wrong—and that the act done was a punishable crime. The boy was somewhat past twelve years of age. The Court of Appeals held that these opinions were properly received. “We hold, therefore,” they say, “that it was not error to permit the witnesses to state their opinions that the defendant, at the time of the commission of the burglary, had sufficient discretion to understand the nature and illegality of the acts constituting that crime, said witnesses having stated the facts upon which their opinions were based; that is, their acquaintance with the defendant; that he was a bright boy, could read and write, etc. As to the weight to be given to these opinions, that was a matter for the jury to consider and determine, and does not relate to the admissibility of the opinions as evidence.”<sup>1</sup>

§ 72. **Right to Order an Examination of the Person by Medical Experts in Cases of Alleged Impotency.**—Wherever impotency has been acknowledged as an impediment to marriage, the courts have compelled the parties, in proceedings to obtain a decree of nullity, to submit their persons to an examination by experts, whenever such an examination was necessary for the purpose of determining the fact of impotency. This arises from the necessity of the case, especially in the case of females, for impotency on the part of the female, which cannot be cured by proper medical treatment or a surgical operation, is said to be very rare. Divorce for the impotency of the female is limited to cases of an impervious or supposed impervious vagina, from an original malformation, or the effect of some supervening infirmity

<sup>1</sup> Carr v. State, 24 Tex. Ct. of App. 562.



or disease, as mere sterility is not sufficient ground for a decree of nullity. "From the very nature of the case, it appears to be impossible to ascertain the fact of incurable impotency, especially where the husband is the complaining party, except by a proper surgical examination by skillful and competent surgeons in connection with other testimony.

\* \* \* And I have no doubt as to the power of this court to compel the parties, in such a suit, to submit to a surgical examination, whenever it is necessary to ascertain facts which are essential to the proper decision of the cause."<sup>1</sup> As it is essential that the impotency should be incurable,<sup>2</sup> it is necessary that the fact of incurability should be made out by the evidence of experts who have made a personal examination. The right of the court to order such an examination, and the necessity for making such order, can no longer be considered as involved in any doubt whatever.<sup>3</sup> And where the wife is the plaintiff, and the libel states her to have been a spinster at the time of the marriage, it is usual to order an inspection of her person, as well as that of the husband, because her virginity and capacity implies his impotency.<sup>4</sup>

§ 73. **Who should be Appointed to Make the Examination.**—According to the English practice the inspection was intrusted to three medical experts, either two physicians and a surgeon, or two surgeons and a physician, the adverse party having

<sup>1</sup> *Devenbagh v. Devenbagh*, 5 Paige, 554.

<sup>2</sup> *Brown v. Brown*, 1 Haggard, 523.

<sup>3</sup> *Briggs v. Morgan*, 3 Phillimore, 325; *Welde v. Welde*, 2 Lee, 580; *H—— v. P——* (L. R.), 3 Prob. & Div. 126; *G—— v. G——* (L. R.), 2 Prob. & Div. 287; *Newell v. Newell*, 9 Paige, 26; *Anon.* 35 Ala. 226.

<sup>4</sup> *Coote's Ecc. Pr.* 367. And see *Norton v. Seton*, 3 Phillimore, 147.

the privilege of naming one or more.<sup>1</sup> But in *Welde v. Welde*,<sup>2</sup> decided in 1830, the inspection of the wife was made by midwives, while that of the husband was by physicians. In this country we find Chancellor WALWORTH declaring that the examination should be made by "physicians of intelligence or skill, who by study or practice have made themselves well acquainted with the nature and progress of the disease which has caused the defendant's incapacity."<sup>3</sup> And in this same case the Chancellor said: "The defendant must therefore submit to such an examination by one or more respectable gentlemen of the medical profession, who may be named for that purpose by the husband, with the sanction of the court. \* \* \* Such medical attendants as she may think proper to call in are also to be present at the time of her examination by the complainant's professional witnesses." In another case it is said that in the selection of the experts due regard will be paid to the feeling and the wishes of the defendant.<sup>4</sup> Proper respect for the feelings of the party to be examined requires that the number of the experts appointed to make the examination should be restricted to the smallest number consistent with the interests of justice.

§ 74. **When Compulsory Examination in such Cases will not be Ordered.**—Where the party against whom impotency is alleged, has already submitted to an examination of competent physicians, whose testimony can be readily obtained, it is said that a

<sup>1</sup> Coote's Ecc. Prac. 388. And see *Dean v. Aveling*, 1 Robertson, 279.

<sup>2</sup> 2 Lee, 580.

<sup>3</sup> *Newell v. Newell*, 9 Paige, 26.

<sup>4</sup> *Devenbagh v. Devenbagh*, 5 Paige, 554, 558.

further examination will not be insisted on.<sup>1</sup> But where the wife claimed that her incapacity existed now, but not at the time of the marriage, and to prove her claim produced the certificate of two medical gentlemen who had examined her recently, expressing their belief that the incapacity had arisen since the marriage, Chancellor WALWORTH, upon the application of the husband, ordered another examination, declaring that under the peculiar circumstances of the case, the complainant ought not to be compelled to leave the decision of his cause to rest solely upon the *ex parte* examination made by the physicians selected by the wife.<sup>2</sup>

§ 75. **Summoning Experts to Assist in Determining the Proper Interrogatories.**—The usual practice in such cases has been to direct a reference to a master, to take the testimony and report thereon. And when the parties do not agree as to the interrogatories to be propounded on the examination, they must be settled by the master, who may summon physicians or surgeons to assist him in determining the necessary interrogatories. It is necessary that the defendant, in connection with the examination by the experts, should answer all needful inquiries propounded by them, and the answers should be given under oath. This subject was considered by Chancellor WALWORTH at an early day in New York. "The interrogatories to be propounded to her (the defendant)," he says, "must be such only as relate to this alleged incapacity, and the commencement and progress of the disease by which it has probably been produced. And if the parties

<sup>1</sup> *Brown v. Brown*, 1 Haggard, 523, note a; *Devenbagh v. Devenbagh*, 5 Paige, 544, 558.

<sup>2</sup> *Newell v. Newell*, 9 Paige, 26.



cannot agree upon the proper interrogatories, after having consulted with their physicians on the subject, the master in settling the interrogatories to be propounded to the defendant in connection with her examination by medical gentlemen, is to be at liberty to summon before him, and examine on oath, any physicians or surgeons, to enable him to decide what interrogatories may be necessary or proper to be allowed.”<sup>1</sup>

§ 76. **The Subject of Inquiry — Structural Defect — Impracticability of Consummation.**—The inquiry of the experts is to be directed not merely to the discovery of whether a structural defect exists. It is possible that although no structural defect exists, the case may show the impracticability of consummation. In a recent case in England,<sup>2</sup> a divorce was obtained, where the professional witnesses swore that no structural defect existed, but there was an impracticability of consummation. As this is important, we quote the language of the court: “The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible, if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid, if it be shown that connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied, which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, will not

<sup>1</sup> *Newell v. Newell*, 9 Paige (N. Y.), 26, 27.

<sup>2</sup> *G—— v. G——*, 2 Prob. & Div. (L. R.) 281.

submit to.”<sup>1</sup> But a merely wilful and wrongful refusal of marital intercourse will never justify a decree of nullity by reason of impotence, although if persisted in long enough, the court may infer that it arises from incapacity.<sup>2</sup>

§ 77. **Defraying the Expenses of the Examination by the Experts.**—The husband must, of course, furnish all the necessary funds to pay the expenses of the surgical examination.<sup>3</sup> If the wife refuses to submit herself to the examination ordered by the court, the allowance of her alimony may be suspended until she consents to the examination as directed.<sup>4</sup> And either party refusing to submit to such an examination, might undoubtedly be punished for contempt of court.<sup>5</sup> But as a refusal to submit to the examination has been regarded as evidence of incapacity,<sup>6</sup> a party will perhaps ordinarily hesitate before refusing compliance with the order of the court in such cases.

§ 78. **Compulsory Examination in Criminal Cases.**—Whether the court has power to order a compulsory examination by experts of the person of a defendant in a criminal proceeding, is an important question which has been somewhat considered by the courts, and upon which a difference of opinion exists. The question turns on the construction to

<sup>1</sup> See also *P—— v. L——*, 3 Prob. Division (L. R.), 73, note 2; *H—— v. P——*, 3 Prob. & Div. (L. R.) 126.

<sup>2</sup> *S—— v. A——*, 3 Probate Division (L. R.), 72.

<sup>3</sup> *Devenbagh v. Devenbagh*, 5 Paige, 554, 558.

<sup>4</sup> *Newell v. Newell*, 9 Paige, 26.

<sup>5</sup> See *Schroeder v. C., R. I., etc. R. Co.*, 47 Iowa, 375.

<sup>6</sup> *Harrison v. Harrison*, 4 Moore, P. C. 96, 103, Lord Brougham's opinion. See, too, *H—— v. P——*, 3 Prob. & Div. (L. R.) 126. The court should be satisfied, however, that there was no collusion between the parties. *Pollard v. Wyborn*, 1 Hagg. Ecc. R. 725; *Sparrow v. Harrison*, 3 Curteis, 16.

be placed on the constitutional provisions which provide that the accused shall not be compelled to give evidence against himself in any criminal case. Such a provision is found in the Constitution of the United States, and in the Constitution of the several States, with hardly an exception. In *Jacob's Case*<sup>1</sup> the Supreme Court of North Carolina, in 1858, held that a defendant could not be compelled to exhibit himself to the inspection of a jury for the purpose of enabling them to determine his *status* as a free negro. And this ruling was approved by the same court in *Johnson's Case*<sup>2</sup> in 1872. Two years later the subject again came up in the same court in *Garret's Case*.<sup>3</sup> In that case it appeared that the defendant had stated to persons present on the night of the homicide, that the deceased came to her death by her clothes accidentally catching fire while the deceased was asleep, and that she, the defendant, in attempting to put out the flames burnt one of her hands. At the coroner's inquest the defendant was compelled to unwrap the hand which she had stated was burnt, and exhibit it to a physician, in order that he might see whether there was any indication of burn upon it. And it was held that the actual condition of her hand, although she was ordered by the coroner to exhibit it to the doctor, was admissible evidence. *Jacob's Case* was distinguished as follows: "The distinction between that and our case is that in *Jacob's Case*, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was

<sup>1</sup> 5 Jones, 259.

<sup>2</sup> 67 N. C. 58.

<sup>3</sup> 71 N. C. 58.



within the prohibited degree of color; thus he was forced to become a witness against himself. This was held to be error. In our case, not the prisoner, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation." In Nevada it has been held that the court could lawfully compel a criminal defendant, against his objection, to exhibit his bare arm, for the purpose of determining whether it had on it certain tattoo marks. The question of identity was raised, and a witness had testified that he knew the defendant, and knew that he had tattoo marks (describing them) on his right fore-arm.<sup>1</sup> This is one of the best considered cases on this side of the question. The court declared that the Constitution prohibited the State from compelling a defendant to be a witness against himself, because it was believed that he might, by the flattery of hope or suspicion of fear, be induced to tell a falsehood, and that this reason was inapplicable to an examination of the person, which could not in the very nature of things lead to a falsehood. "The Constitution means," said the court, "just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is, to testify, against himself. To use the common phrase, 'it closes the mouth' of the prisoner. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation, or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge, or magistrate."

The same question was similarly decided in the

<sup>1</sup> State v. Ah Chuey, 14 Nev. 79; s. c., 1 Cr. Law Mag. 634.

Court of Appeals of Texas, in 1879, although the question was presented in a different form. In that case testimony was held admissible that the footprints, which the prisoner was compelled to make in an ash heap, corresponded with those made on the night of the murder about the premises of the deceased.<sup>1</sup> And a similar ruling on a similar state of facts was made in North Carolina.<sup>2</sup> But a different conclusion has been reached in Georgia,<sup>3</sup> and in Tennessee<sup>4</sup> on a like state of facts. In Michigan, on the trial of one for burglary, a rubber shoe was produced, and when the prisoner took the stand in his own behalf he was asked to try it on, which he did without objection. He was then asked to measure it, and his counsel objected, but the objection was overruled, and he made the measurement and stated the result. The court held that if there had been any objection made to the prisoner's trying on the shoe the court would have had no authority to require it; and that even the simple matter of measurement he might have declined had he seen fit.<sup>5</sup> And in New York the subject was presented in a case which involved the question whether the prisoner had been delivered of a child. The coroner directed two physicians to go to the jail and make an examination of the woman, and determine whether she had recently been delivered of a child or not. She denied having been pregnant, and objected to

<sup>1</sup> Walker v. State, 7 Tex. Ct. of App. 245, 265.

<sup>2</sup> State v. Graham, 74 N. C. 646; s. c., 21 Am. Rep. 493.

<sup>3</sup> Day v. State, 63 Ga. 667; Blackwell v. State, 67 Ga. 76; s. c., 3 Cr. Law Mag. 394.

<sup>4</sup> Stokes v. State, 5 Baxt. 519; s. c., 30 Am. Rep. 72.

<sup>5</sup> People v. Mead, 50 Mich. 228, 231.

being examined by the physicians. But on being told that if she did not submit to the examination she would be compelled to submit by force, she yielded, and her private parts were examined by the physicians with a speculum, and they examined her breasts. The court refused to allow the physicians to testify, declaring that such an examination was a violation of the spirit and meaning of the Constitution, which declares that "no person shall be compelled in any criminal case to be a witness against himself." "They might as well have sworn the prisoner, and compelled her by threats to testify that she had been pregnant and been delivered of the child, as to have compelled her by threats to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and had been recently delivered of a child."<sup>1</sup>

In a recent case in Iowa a physician made an examination of the face and neck of the defendant while in jail, and testified that he found several scratches. At the trial the defendant did not object to the admission of the testimony, but on appeal he insisted that there was error in admitting it, and claimed that the testimony was in respect to an examination to which he was compelled to submit, and that such examination was in violation of his constitutional rights, and that being so that the admission of the testimony was error, even though not objected to. The court replying to this say: "Without considering the legal questions suggested, it is sufficient to say that we see no evidence that the defendant was compelled to submit to an examination. It is true the evidence shows, that when Dr. Har-

<sup>1</sup> *People v. McCoy*, 45 How. Pr. 216.



man went into the jail, the sheriff accompanied him, but there is no evidence that the sheriff did or said anything in respect to the examination. We think that there is no error in admitting the evidence."<sup>1</sup>

It will be observed that in some of the cases in which the question has been considered, the right to order an examination of the person by experts was not directly involved, but they all involve the same principle, and it has been necessary to consider them all in this connection. The result of the examination of the cases shows a decided conflict of authorities, and that the question is still unsettled and open.

§ 79. **Compulsory Examination in Actions for Damages.**—In actions brought for the recovery of damages for personal injuries, the courts have, in some cases, on the application of the defendant, compelled the plaintiff to submit his person to an examination by physicians and surgeons for the purpose of ascertaining the character and extent of his injuries. The purpose of all judicial inquiries should be the ascertainment of the facts to the end that there may be an administration of justice. It is difficult to see, therefore, why, in civil actions, it should not be at least within the discretion of a trial court in proper cases and under proper safeguards to direct the plaintiff to submit his person to medical inspection. And this view of the matter has been taken by some of the courts. Thus, in a case in Iowa, the court declared that refusal to submit to an examination so ordered would render the party liable to punishment for contempt of court, and if continued so long

<sup>1</sup> State v. Struble, 71 Iowa, 11, 16.

as to effectively obstruct the progress of the case, all allegations as to personal injury might be stricken from the pleadings. And it is declared that, "under the explicit directions of the court, the physicians should have been restrained from imperiling in any degree the life or health of the plaintiff. The use of anæsthetics, opiates or drugs of any kind, should have been forbidden, if indeed it had been proposed, and it should have prescribed that he should be subjected to no tests painful in their character."<sup>1</sup> The above case was decided in 1877, and the conclusion reached was arrived at irrespective of authority, the court declaring that it was unable to find any case in which the question had been considered. But the same question had been considered in New York in 1868, and it was there held that the court, in an action for malpractice against a surgeon, could compel the plaintiff to submit her person to an examination at the hands of the defendant's experts.<sup>2</sup> "It is not proper," said the court, "that the cause should be left to be determined on the evidence of two or

<sup>1</sup> *Schroder v. The R. I. & P. R. R. Co.*, 47 Iowa, 375.

<sup>2</sup> *Walsh v. Sayre*, 52 How. Pr. 334. The complaint alleged that the defendant, in treating the plaintiff for the injury in the neighborhood of her hips, had so negligently and unskillfully as to puncture the joint, causing the synovial fluid which lubricates the cartilaginous surface of the joint to escape, thereby seriously and permanently injuring the hip, and rendering the whole leg useless, and perhaps rendering its amputation necessary. The defendant petitioned the court, stating that, since the commencement of the action, he had endeavored to obtain leave to make a professional examination of the affected part, but had been refused permission so to do. That he could not safely proceed to trial, nor properly defend the action, unless he could have a personal inspection and professional examination of the affected parts, and praying that said examination and personal inspection by himself and such other skillful and eminent surgeons as he might name might be had under the direction of the sheriff, or a referee appointed for that purpose, at such time and place, and in such form or manner, as to the court might seem just and proper.

three surgeons, selected by the plaintiff out of the whole body of surgeons, perhaps because their views are adverse to the defendant's; but it is eminently proper that defendant should have the benefit of the testimony of one or two surgeons of his own selection, and that these surgeons should have the requisite means of forming a correct judgment, one of which is the examination of the affected part." There are other cases to the same effect.<sup>1</sup>

The cases above referred to recognize the power of the court in its discretion to order such an inspection. But in one instance at least the defendant has been recognized as being entitled as matter of right to have such an order made. In that case it was declared that where the plaintiff in such an action alleges his injuries to be of a permanent nature, the defendant is entitled as a matter of right rather than of favor to have the court order the plaintiff to submit his person to the examination of a surgeon, unless there is already so much expert evidence in the case that the court in its discretion may decline to make the order.<sup>2</sup>

But there are cases in which the power of the court to make such an order has been denied. The question was considered in Missouri in 1873, in an action against a railroad company for personal injuries. The point raised was summarily disposed of in the opinion, the power to order the examination being denied. The court merely said: "The proposal

<sup>1</sup> *White v. Milwaukee, etc. R. R. Co.*, 61 Wis. 536; *Miami, etc. R. R. Co. v. Bailly*, 37 Ohio St. 104; *Shephard v. Missouri, etc. R. R. Co.*, 85 Mo. 629; *Atchison, etc. R. R. Co. v. Thul*, 29 Kan. 466; *International, etc. R. R. Co. v. Underwood*, 64 Tex. 464; *Missouri Pacific, etc. R. R. Co. v. Johnson*, 72 Tex. 95.

<sup>2</sup> *Sibley v. Smith*, 46 Ark. 275.



to the court to call in two surgeons and have the plaintiff examined during the progress of the trial, as to the extent of her injuries, is unknown to our practice and to the law. There was abundant evidence on this subject on both sides; any opinion of physicians or surgeons at the time would have only been cumulative evidence at best, and the court had no power to enforce such an order."<sup>1</sup> That case has been since overruled.<sup>2</sup> In Illinois the right to order such an examination was also denied, but there also the matter was disposed of without discussion.<sup>3</sup> There are a few other cases to the same effect.<sup>4</sup>

In a recent case in Indiana, it was held no error to decline to order a submission to examination when the application was made by the defendant after the plaintiff had closed his evidence. The court say: "It is undoubtedly true that the court may in its discretion, in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination, by competent physicians and surgeons, when necessary to ascertain the nature, extent and permanency of injuries; but where the application is not made until after the close of the plaintiff's evidence, and no reason is shown for the delay in making the application, it will not be error to refuse the order, especially where the plaintiff offers to submit to a private examination as soon as the attendance of medical experts on his behalf can be secured."<sup>5</sup>

<sup>1</sup> *Loyd v. Hannibal, etc. R. R. Co.*, 53 Mo. 509, 515, 516.

<sup>2</sup> *Shephard v. Missouri, etc. R. R. Co.*, 85 Mo. 629.

<sup>3</sup> *Parker v. Enslow*, 102 Ill. 272, 279.

<sup>4</sup> *Roberts v. Ogdensburgh, etc. R. R. Co.*, 29 Hun (N. Y.), 154; *Stuart v. Haven*, 17 Neb. 214; *Sioux City, etc. R. R. Co. v. Finlayson*, 16 Neb. 578, 588.

<sup>5</sup> *Hess v. Lowrey* (Sup. Ct. Ind. 1890), 7 L. R. A. 90.

When the action is not brought to recover damages for the injury done to the person, but is for an injury to the character of another, a different question is presented. Thus, where an action for slander was brought by an unmarried woman, it having been alleged that the defendant had spoken of the plaintiff that she was a whore, and had become pregnant, and had suffered an abortion to be procured upon her, it was held that the defendant was not entitled, under a plea of justification, to an order requiring the plaintiff to submit her person to an examination by medical experts.<sup>1</sup> The court declared: "One should not publish and circulate slanderous charges against a young unmarried female, \* \* unless he is able to substantiate them when called upon to do so, without calling upon the court to aid in the search for evidence in his behalf by ordering and subjecting her to an indelicate examination of her person, with the hope of obtaining some information advantageous to the defense, and calling to his aid the power of the court as a means of humiliating her still more." The court declared it had not been cited to any case where such an examination had been held proper, and added that it thought no such case could be found.

§ 80. **Refusal to be Examined by a Particular Expert who is Personally Obnoxious.**—In a case where the trial court, on application of the defendant, had ordered the plaintiff to submit to an examination of his person, the defendant selected two medical experts to make the examination, to one of whom the plaintiff objected, stating that he declined to be examined by the objectionable physician, or in his

<sup>1</sup> Kern v. Bridwell, 119 Ind. 226.

presence, at the same time stating that his declination was based on his "personal aversion" to the expert in question, adding that he tendered himself for examination by the other expert and any other respectable physician and his own consulting physician whom he desired to be present. Thereupon the defendant called the attention of the court to its order, and to the refusal as above stated, and asked the court to enforce its order and require the plaintiff to submit to the examination of the two physicians whom the defendant had selected, including the obnoxious one above referred to. The court declined to enforce its order, saying it would not compel the plaintiff to submit to an examination by a physician to whom he had personal aversion. On appeal the Supreme Court held that the trial court did not err in refusing to compel the plaintiff to be examined by a physician towards whom he had a personal aversion, although his objection did not go to the competency or integrity of the physician proposed.<sup>1</sup>

When a court intends to order a party to submit to a personal examination, the better plan would seem to be for the court to appoint one or more disinterested experts either of its own selection, or, better yet, such as may be agreed upon by both parties.

§ 81. **The Opinions of Medical Men in Miscellaneous Cases.**—We have stated that the opinions of medical experts are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice. The application of this principle made by the courts in certain miscellaneous cases may be helpful, and will here be

<sup>1</sup> Missouri Pacific R. R. Co. v. Johnson, 72 Tex. 95, 101, (1888).



given. Their opinions have been held admissible as to the tendency of an overflow of water upon premises to create sickness;<sup>1</sup> as to the permanency of a person's loss of vision;<sup>2</sup> as to the condition of the body of the deceased as to fullness or paucity of blood;<sup>3</sup> upon the question of whether it be good medical practice to withhold from a patient in a particular emergency, or under given or supposed circumstances, a knowledge of the danger and extent of his disease;<sup>4</sup> as to the condition of human remains after burial; as to how long before decay would set in, and when it would be complete;<sup>5</sup> whether a certain routine of diet was injurious to the health of children;<sup>6</sup> as to the manner in which *prolapsus uteri* would be caused, and the degree of violence that would produce it;<sup>7</sup> whether the appearance of the extravasated blood in the neck was an indication of mechanical violence or disease, and whether the clot of blood found on the *post-mortem* examination could have existed twelve hours without causing death;<sup>8</sup> whether a child was a "full time child;"<sup>9</sup> as to what indications would have been found on the *post-mortem* examination of a body taken from the water, if the person had been suffocated first and then had fallen into the water;<sup>10</sup> as to the curability of a disease, the nature and cause

<sup>1</sup> *City of Eufaula v. Simmons*, 86 Ala. 515.

<sup>2</sup> *Tinney v. New Jersey Steamboat Co.*, 12 Abb. Pr. (N. S.) 1.

<sup>3</sup> *O'Mara v. Commonwealth*, 75 Pa. St. 424.

<sup>4</sup> *Twombly v. Leach*, 11 Cush. 405.

<sup>5</sup> *State v. Secrest*, 80 N. C. 450, 453.

<sup>6</sup> *Crowley v. People*, 83 N. Y. 464, 471.

<sup>7</sup> *Napier v. Ferguson*, 2 P. & B. (New Brunswick) 415.

<sup>8</sup> *State v. Pike*, 65 Me. 111, 114.

<sup>9</sup> *Young v. Makepeace*, 103 Mass. 50.

<sup>10</sup> *Erickson v. Smith*, 2 Abb. App. Decis. (N. Y.) 64.

of which he has described;<sup>1</sup> whether a certain wound given on the chest endangered life;<sup>2</sup> as to the injuries likely to be produced under a given state of facts, the precise facts being stated;<sup>3</sup> as to the sex of a person from an examination of the skeleton, although it is an error to receive the opinion of a non-professional witness on such a question;<sup>4</sup> and whether a child would have been born alive if it had received medical assistance in time.<sup>5</sup> A medical expert can be asked as to what in his judgment was the probability of recovery, assuming such and such symptoms and condition;<sup>6</sup> and as to whether a certain injury was likely to produce or be followed by certain diseases,<sup>7</sup> it being always proper to ask a medical expert as to the future consequences which are expected to follow the injury complained of.<sup>8</sup> A medical witness can always testify concerning the nature and extent of an injury.<sup>9</sup> They have been allowed to testify whether fright would produce heart trouble.<sup>10</sup>

§ 82. **Opinions of Non-Professional Witnesses on Questions Related to Medical Science.**—We will consider first the cases in which such opinions have been received. A physical fact within the experience of a witness is not so much a scientific question

<sup>1</sup> *Matteson v. New York, etc. R. R. Co.*, 35 N. Y. 487.

<sup>2</sup> *Rumsey v. People*, 19 N. Y. 41.

<sup>3</sup> *Wendell v. Troy*, 39 Barb. (N. Y.) 329.

<sup>4</sup> *Wilson v. State*, 41 Tex. 320, 321.

<sup>5</sup> *Western Union Telegraph Co. v. Cooper*, 71 Tex. 507, 512.

<sup>6</sup> *Peterson v. Chicago, etc. R. R. Co.*, 38 Minn. 511; *Griswold v. New York, etc. R. R. Co.*, 23 N. Y. Sup. R. 729.

<sup>7</sup> *Kelly v. Erie Telegraph & Telephone Co.*, 34 Minn. 321.

<sup>8</sup> *Strohm v. New York, etc. R. R. Co.*, 96 N. Y. 305.

<sup>9</sup> *Evansville, etc. R. R. Co. v. Crist*, 116 Ind. 446; *Louisville, etc. R. R. Co. v. Snider*, 117 Ind. 435.

<sup>10</sup> *Illinois Central R. R. Co. v. Latimer* (Ill.), 21 N. E. Rep. 7.

as to exclude non-expert testimony.<sup>1</sup> A person may therefor testify as to his pain, suffering, or internal condition, so far as the same is perceptible to his senses.<sup>2</sup> He may testify as to the immediate physical consequences of an injury received by him.<sup>3</sup> Such evidence is considered to relate to facts and not to be mere opinion. It is not necessary, therefore, that a person should be an expert in order to testify that his own ribs were broken;<sup>4</sup> or that a certain substance takes away the pain of filling teeth, the substance having been used on him.<sup>5</sup>

Not only may a non-expert thus testify concerning his own condition, but he may testify concerning the health and physical condition of another, whom he has had an opportunity of observing.<sup>6</sup> Thus, such a witness may state that a third person was sick,<sup>7</sup> or in poor health,<sup>8</sup> or was formerly in good health,<sup>9</sup> and then grew worse,<sup>10</sup> or appeared to be well or ill.<sup>11</sup> It has been held in Pennsylvania that while a non-expert witness cannot testify that a person was afflicted with a special disease, yet he may testify that he observed in such person a con-

<sup>1</sup> *Bragg v. City of Moberly*, 17 Mo. App. 221; *Dolan v. City of Moberly*, 17 Mo. App. 436.

<sup>2</sup> *Wright v. City of Fort Howard*, 60 Wis. 119.

<sup>3</sup> *Bland v. S. P. R. Co.*, 65 Cal. 626.

<sup>4</sup> *Ferguson v. Davis Co.*, 57 Iowa, 601.

<sup>5</sup> *Reeve v. Dennett*, 145 Mass. 23.

<sup>6</sup> *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138.

<sup>7</sup> *Chicago, etc. R. R. Co. v. George*, 19 Ill. 510, 515; *Bennett v. Fail*, 26 Ala. 605; *Barker v. Coleman*, 35 Ala. 221; *Stone v. Watson*, 37 Ala. 279; *Higbie v. Guardian Mutual Life Ins. Co.*, 53 N. Y. 603; *Shawnee-town v. Mason*, 82 Ill. 337. See *Thompson v. Bertrand*, 23 Ark. 730.

<sup>8</sup> *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138.

<sup>9</sup> *Smalley v. Appleton*, 70 Wis. 340; *Parker v. Boston Steamboat Co.*, 109 Mass. 449, distinguishing *Ashland v. Marlborough*, 99 Mass. 48.

<sup>10</sup> *Louisville, etc. R. R. Co. v. Wood*, 113 Ind. 544.

<sup>11</sup> *Canady v. Lynch*, 27 Minn. 435; *Wilkenson v. Mosely*, 30 Ala. 562.



dition which was in fact a symptom of the disease.<sup>1</sup> A wife has been permitted to testify that her husband had a rupture, the testimony being received upon the theory that it was not a fact resting in opinion, and that its determination did not involve any question of science or skill.<sup>2</sup> And a husband has been allowed to testify that he thought his wife's limb was broken.<sup>3</sup> In Alabama it is said that any person may speak of the existence of disease in another when the disease is perceptible by the senses.<sup>4</sup> It seems that a person who is not a physician may testify whether it was necessary for a party to receive medical assistance, and it has been even said that he may testify as to the length of time such assistance was necessary. It was said that "in a question of this kind, any person of intelligence is capable of judging of the necessity of medical advice and services. It is universally acted upon by all classes of mankind, and we are not disposed to lay down a rule that none but a physician is competent to prove that a person is sick, or so sick as to require medical advice."<sup>5</sup> And a non-expert has been permitted to testify as to his opinion concerning the soundness of a slave, stating the facts upon which his opinion was founded.<sup>6</sup> On a trial under an indictment for infanticide, a non-professional witness who examined the dead body of the child was allowed to testify

<sup>1</sup> *United Brethren Mut. Aid Society v. O'Hara*, 120 Pa. St. 256.

<sup>2</sup> *Duntz v. Van Beuren*, 12 N. Y. Sup. Ct. 648.

<sup>3</sup> *Goshen v. England (Ind.)*, 21 N. E. Rep. 977.

<sup>4</sup> *Milton v. Rowland*, 11 Ala. 732; *Fountain v. Brown*, 38 Ala. 72; *Wilkeson v. Mosely*, 30 Ala. 562.

<sup>5</sup> *Chicago etc. R. R. v. George*, 19 Ill. 510.

<sup>6</sup> *Norton v. Moore*, 40 Tenn. 483.

that he "considered it fully developed"—this being considered a matter of fact open to observation, and the witness being subject to cross-examination as to his use of the words and his knowledge of their meaning.<sup>1</sup> Such a witness having seen the wounded person has been allowed to describe the wound as being inflamed and tender to the touch;<sup>2</sup> and to testify as to the condition of a person's health and body before and after an injury.<sup>3</sup> Non-expert witnesses have been allowed to say whether a person has had the full use of his arm since a certain injury, and has been able to work;<sup>4</sup> and such witnesses can testify to a person's changed appearance since an injury.<sup>5</sup>

The right of an ordinary witness to express an opinion concerning the mental condition of another has been previously considered.<sup>6</sup>

We will now consider the cases in which the opinions of non-professional witnesses have not been received. As a rule one who is not skilled in the science or practice of medicine, is not competent to express an opinion that a person is afflicted with a particular disease,<sup>7</sup> or whether there was any case of a particular disease in a certain neighborhood.<sup>8</sup> The opinions of unprofessional witnesses have been held inadmissible on the question whether a woman had

<sup>1</sup> *Hubbard v. State*, 72 Ala. 164.

<sup>2</sup> *Craig v. Gerrish*, 58 N. H. 513.

<sup>3</sup> *Townsdin v. Nutt*, 19 Kan. 282.

<sup>4</sup> *Harris v. Detroit, etc. R. R. Co. (Mich.)*, 42 N. W. Rep. 1111.

<sup>5</sup> *Bridge v. Oshkosh*, 71 Wis. 363; *Weber v. Creston*, 75 Iowa, 16.

<sup>6</sup> See section 66.

<sup>7</sup> *Lush v. McDaniel*, 13 Ired. (N. C.), 485; *Thompson v. Bertrand*, 23 Ark. 730; *Chicago, etc. R. R. Co. v. George*, 19 Ill. 510, 516; *Shawnee-town v. Mason*, 82 Ill. 337, 339; *U. B. Mutual Aid Society v. O'Hara*, 120 Pa. St. 256.

<sup>8</sup> *Evans v. People*, 12 Mich. 27.

been pregnant.<sup>1</sup> A non-professional witness who had known the injured person for a number of years before the accident and who was with such person several weeks thereafter, has not been allowed to give an opinion as to the effect of the injury upon such person's health.<sup>2</sup> The fact that one who is not a physician or surgeon has been held incompetent to express an opinion as to the instrument with which a wound was made is elsewhere considered.<sup>3</sup> In a case in Michigan the court says: "No witness, medical or otherwise, can be allowed to give testimony from his observation concerning the nature of a person's illness or its causes without proof, both of a sufficient examination and such knowledge or experience as will qualify him to offer an opinion."<sup>4</sup>

A daughter, who was not an expert, has been held incompetent to testify that her mother suffered in her head and stomach.<sup>5</sup> And the testimony of workmen, not shown to be experts, that certain infected rags were the cause of small-pox, which they or their children had taken, has been held incompetent.<sup>6</sup> On a trial for murder where the defense was insanity, the defendant's mother testified that he had fits when a child, but she was held incompetent to answer the question as to what effect the fits had on him.<sup>7</sup>

§ 83. **Experts in the Diseases of Animals.**—No question is made but that a veterinary surgeon is competent to express an opinion as an expert as to

<sup>1</sup> *Boies v. McAllister*, 12 Me. 310.

<sup>2</sup> *Monongahela Water Co. v. Stewartson*, 96 Pa. St. 436.

<sup>3</sup> See section 52.

<sup>4</sup> *People v. Olmstead*, 30 Mich. 434.

<sup>5</sup> *Lombard, etc. R. R. Co. v. Christian*, 124 Pa. St. 114.

<sup>6</sup> *Dushane v. Benedict*, 120 U. S. 647.

<sup>7</sup> *State v. Hockett*, 70 Iowa, 442.



the condition and diseases of animals.<sup>1</sup> But a person who is not a veterinary surgeon may give testimony in such cases. The courts have found it necessary to establish a somewhat liberal rule as to the competency of persons to give evidence on the subject of diseases in animals, and it is not required that the witness, to be competent, should have made the treatment of diseases in domestic animals a distinct profession. All that is insisted on is that the witness should have had much experience with such diseases and with their treatment. He is then allowed to state the facts and express an opinion based thereon.<sup>2</sup> In a case in Indiana a witness, who was not a farrier, was called to testify as to the disease of the eyes of a horse. The witness professed to understand when he examined a horse whether his eyes were good or not, though he acknowledged that there might be diseases of the eyes of horses with which he was unacquainted. He was asked, whether, from his knowledge of the diseases of horses' eyes, he believed the disease of the eyes of the horse in question had been of long standing, and had existed before the exchange of horses made by the parties. It was held that he should be permitted to answer, and it was said: "We have scarcely any veterinary surgeons in our country, and the opinions of men of such knowledge as this witness appears to have, must be admitted in cases like the present."<sup>3</sup>

<sup>1</sup> *Missouri Pacific R. R. Co. v. Finley*, 38 Kan. 550; *Pinney v. Cahill*, 48 Mich. 584.

<sup>2</sup> See *Slater v. Wilcox*, 57 Barb. 604, 608; *Vates v. Cornelius*, 59 Wis. 615; *Johnson v. Moffit*, 19 Mo. App. 159; *Peer v. Ryan*, 54 Mich. 224.

<sup>3</sup> *House v. Fort*, 4 Blackf. (Ind.) 293.

But a person who is not a physician, surgeon or veterinarian, and who has had no particular experience with cattle, but whose knowledge is derived simply from reading and some little observation, has been held not competent to testify as an expert in relation to disease in animals.<sup>1</sup>

It has been held that witnesses cannot testify that whistling in horses is an unsoundness, or that it is universally considered so among horsemen, that being a question for the jury.<sup>2</sup> The same case holds that a veterinary surgeon who has ridden after and seen a horse driven may testify whether he saw any indications about him of being a whistler.

It has been held not competent to introduce the testimony of a veterinary surgeon that horses frequently fall down and die instantly without any apparent cause, such evidence not being in the nature of an expert opinion.<sup>3</sup>

<sup>1</sup> *Missouri Pacific R. R. Co. v. Finley*, 38 Kan. 550.

<sup>2</sup> *Moore v. Haviland* (Vermont), 17 Atl. Rep. 725.

<sup>3</sup> *McPherrin v. Jennings*, 66 Iowa, 622.

## CHAPTER V.

## EXPERT TESTIMONY IN THE SCIENCE OF LAW.

## SECTION.

84. The Law as a Subject for the Testimony of Experts.
85. Of what Laws Courts take Judicial Notice, and Expert Testimony is not Received.
86. Of what Laws Courts do not take Judicial Notice, and Expert Testimony may be Received.
87. Proof of the Unwritten Law of a Foreign State.
88. Proof by Experts of the Written Law of Foreign States—Allowed in England.
89. Manner of Proof in the United States of the Written Law of Foreign States.
90. Proving the Written Law, in the Discretion of the Court, by the Testimony of Experts.
91. Expert Testimony as to the Construction and Interpretation of Written Law.
92. Presumption that Law is Unwritten.
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94. Who are Qualified to Testify as Experts in Foreign Law.
95. Who are Qualified to Testify as Experts in Foreign Law—The Rule in England.
96. Where Knowledge of the Foreign Law must have been Acquired.
97. Right of Expert to Cite Text Books, Decisions, Codes, etc.
98. How these Citations are to be Regarded.
99. Whether the Question of Foreign Law is for the Court or Jury.
100. Testimony as to Usage and Practice of Courts of Another State.
101. Testimony as to Powers and Obligations of an Attorney in his Relations to his Clients.
102. The Value of Legal Services.

§ 84. **The Law as a Subject for the Testimony of Experts.**—From the earliest times it seems to have



been the practice of the English judges to receive, in certain cases, the opinions of persons skilled in the law. As early as the time of Henry VI., in a case which involved a question relating to civil law, we find it laid down that the common-law judges heard a bachelor of the civil law "argue and discourse upon the difference between *compulsione præcisa et causativa*, as men that were not above being instructed and made wiser by him."<sup>1</sup> And in another case during the same reign, where *ex commengement* had been pleaded, and the party answered that he ought not to be disabled thereby as an appeal was pending, the common-law judges inquired of those who were well versed in the canon law, touching the question involved.<sup>2</sup>

§ 85. **Of what Laws Courts take Judicial Notice, and Expert Testimony is not Received.**—Since experts will not, as a general rule, be examined concerning such laws, as the courts take judicial notice of,<sup>3</sup> it is important to distinguish between the laws which will be judicially noticed, and those which must be proved as facts, when advantage of them is desired.

I. We shall consider first, then, those laws of which courts take judicial notice, and concerning which, therefore, the testimony of experts will not be received, as not being necessary for the information of the court. Such laws are:

1. The law of nations.<sup>4</sup>
2. The law merchant.<sup>5</sup>

<sup>1</sup> 7 Henry VI., 11.

<sup>2</sup> 20 Henry VI., 25.

<sup>3</sup> Jewell v. Center, 25 Ala. 498, 505; The Clement, 2 Curtis, 363.

<sup>4</sup> The Scotia, 14 Wall. 171, 188.

<sup>5</sup> Eddie v. East India Co., 2 Burr. 1226; Jewell v. Center, 25 Ala. 498;

3. The maritime law, so far at least as recognized by the law of nations.<sup>1</sup>

4. The ecclesiastical law, for the purpose of determining how far it is a part of the common law.<sup>2</sup>

5. The courts of a State which has been carved out of another State, take judicial notice of the statutes of the latter State passed prior to the separation.<sup>3</sup>

6. All courts take judicial notice of their domestic law.<sup>4</sup>

7. The courts of a State will take notice of the common law of England without proof, not because it is the common law of a foreign country, but because that common law is a part of our domestic law.<sup>5</sup>

8. The State courts take judicial notice of the Federal Constitution, and of its amendments,<sup>6</sup> as well as of Federal statutes.<sup>7</sup>

*Bradford v. Cooper*, 1 La. Ann. 325; *Goldsmith v. Sawyer*, 46 Cal. 209. The case last cited holds that where a board of brokers have rules, which are not rules or usages of trade and commerce that would be recognized without their adoption by the board, these will not be judicially noticed, but must be shown by experts therein.

<sup>1</sup> *Chandler v. Grieves*, 2 H. Bl. 606, n; *Maddox v. Fisher*, 14 Moore, P. C. 103; *Zugasti v. Lamer*, 12 Moore, P. C. 331; *The Scotia*, 14 Wall. 171, 188; *Taylor on Evidence*, § 5; *Wharton on Evidence*, § 298.

<sup>2</sup> *Sims v. Maryatt*, 17 Q. B. (79 E. C. L.) 292; 1 Roll. Abr. 526; 6 Vin. Abr. 496.

<sup>3</sup> *Delano v. Jopling*, 1 Litt. (Ky.) 417; *Stokes v. Macker*, 62 Barb. (N. Y.) 145; *Doe v. Eslava*, 11 Ala. 1028; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, 9 Mo. 581; *United States v. Turner*, 11 How. 663, 668; *City of Brownsville v. Cavazos*, 2 Woods, 293.

<sup>4</sup> *State v. Jarrett*, 17 Md. 309; *State v. O'Conner*, 13 La. Ann. 486; *Pierson v. Baird*, 2 Greene (Iowa), 235; *Berliner v. Waterloo*, 14 Wis. 378; *Springfield v. Worcester*, 2 Cush. (Mass.) 52; *Division of Howard County*, 15 Kan. 194; *Dolph v. Barney*, 5 Oreg. 191.

<sup>5</sup> *Owen v. Boyle*, 15 Me. 147. 151.

<sup>6</sup> *Graves v. Keaton*, 3 Coldw. (43 Tenn.) 8.

<sup>7</sup> *Kessel v. Albertis*, 56 Barb. (N. Y.) 362; *Papin v. Ryan*, 32 Mo. 21; *Morris v. Davidson*, 49 Ga. 361; *Rice's Succession*, 21 La. Ann. 614, 616;

9. The Federal courts take judicial notice of the laws of the several States composing the national government.<sup>1</sup>

§ 86. **Of what Laws Courts do not take Judicial Notice, and Expert Testimony may be Received.—II.** In passing, in the second place, to the consideration of those laws which will not be judicially noticed, and as to which experts may, therefore, testify, we find:

1. That courts do not take judicial notice of the laws of foreign countries.<sup>2</sup> As said by Lord LANGDALE: "With foreign laws an English judge cannot be familiar; there are many of which he must be totally ignorant; there is, in every case of foreign law, an absence of all the accurate knowledge and ready associations which assist him in the consideration of that which is the English law."<sup>3</sup> So in this country Mr. Chief Justice MARSHALL remarked: "The laws of a foreign nation designed only for the direction of its own affairs are not to be noticed by the courts of other countries, unless proved as facts."<sup>4</sup>

Bayly v. Chubb, 16 Grattan (Va.), 284; Mims v. Swartz, 37 Tex. 13; Jones v. Laney, 2 Tex. 342; Semple v. Hager, 27 Cal. 163; United States v. De Coursey, 1 Pinney (Wis.), 508; Montgomery v. Deeley, 3 Wis. 709, 712.

<sup>1</sup> Junction Railroad Co. v. Bank of Ashland, 12 Wall. 226, 229; Bennett v. Bennett, Deady, 299, 311; Merrill v. Dawson, Hempstead, 563; Smith v. Tallapoosa Co., 2 Woods, 574, 576; United States v. Turner, 11 How. 663, 668; Owings v. Hull, 9 Pet. 607.

<sup>2</sup> Freemoult v. Dedire, 1 P. Wms. 430; Feaubert v. Turst, Pre. Ch. 207; Mostyn v. Farrigas, Cowp. 174; Male v. Roberts, 3 Esp. 163; Smith v. Gould, 4 Moore, P. C. 21; Strother v. Lucas, 6 Pet. 763; Armstrong v. Lear, 8 Pet. 52; United States v. Wiggins, 14 Pet. 334; Damess v. Hale, 1 Otto, 13; Bowdicht v. Solyk, 99 Mass. 138; Owen v. Boyle, 15 Me. 147; Hosford v. Nichols, 1 Paige (N. Y.), 220; McCraney v. Alden, 46 Barb. (N. Y.) 274; Monroe v. Douglas, 5 N. Y. 447, 452.

<sup>3</sup> Nelson v. Bridgeport, 8 Beavan, 527.

<sup>4</sup> Talbot v. Seeman, 1 Cranch, 38.



2. That the courts of one State will not take judicial notice of the laws of any other State. This is upon the theory that the separate States which together constitute the nation are, as respects their political relations to each other, essentially "foreign" countries, whose laws must be proved as facts.<sup>1</sup> At an early day it was held in Vermont, that judicial notice would be taken of the laws of sister States.<sup>2</sup> But that doctrine was subsequently overruled.<sup>3</sup> In an early case in New Jersey, a similar doctrine was intimated,<sup>4</sup> but the *dicta* in that case have also been overruled in later cases in the same court.<sup>5</sup> A similar position was taken at an early day in Tennessee,

<sup>1</sup> Drake v. Glover, 30 Ala. 382; Mobile Railroad Co. v. Whitney, 39 Ala. 468; Forsyth v. Preer, 62 Ala. 443; Newton v. Cocke, 10 Ark. 169; Hempstead v. Reed, 6 Conn. 480; Brackett v. Norton, 4 Conn. 517; Dyer v. Smith, 12 Conn. 384; Bailey v. McDowell, 2 Harring. (Del.) 34; Stanford v. Pruet, 27 Ga. 243; Mason v. Wash, Breese (Ill.), 39; Irving v. McLean, 4 Blackf. (Ind.) 52; Davis v. Rogers, 14 Ind. 424; Johnson v. Chambers, 12 Ind. 112; Carey v. Cincinnati, etc. R. R. Co., 5 Iowa, 357; Taylor v. Runyan, 9 Iowa, 522; Shed v. Augustine, 14 Kan. 282; Beauchamp v. Mudd, Hardin (Ky.), 163; Stephenson v. Bannister, 3 Bibb. (Ky.) 369; Dorsey v. Dorsey, 5 J. J. Marsh. (Ky.) 280; Tyler v. Trabue, 8 B. Mon. (Ky.) 606; Syme v. Stewart, 17 La. Ann. 73; Anderson v. Folger, 11 La. Ann. 269; Legg v. Legg, 8 Mass. 99; Knapp v. Abell, 10 Allen (Mass.), 485; Brimhall v. Van Campen, 8 Minn. 13; Hoyt v. McNeil, 13 Minn. 390; Hemphill v. Bank of Alabama, 6 Sm. & M. (Miss.) 44; Babcock v. Babcock, 46 Mo. 243; Morrissey v. Wiggins Ferry Co., 47 Mo. 521; Ball v. Consolidated Franklin, etc. Co., 32 N. J. Law, 102, 104; Uhler v. Semple, 5 C. E. Green (N. J.), 288; Campion v. Kille, 1 McCarter (N. J.), 229; Hosford v. Nichols, 1 Paige (N. Y.), 220; State v. Twitty, 2 Hawks (N. C.), 248; State v. Surtly, 2 Hawks (N. C.), 441; Evans v. Reynolds, 32 Ohio St. 163; Ripple v. Ripple, 1 Rawle (Penn.), 386; Whitesides v. Poole, 9 Rich. (S. C.) 68; Jones v. Laney, 2 Tex. 342; Anderson v. Anderson, 23 Tex. 639; Rape v. Heaton, 9 Wis. 328; Territt v. Woodruff, 19 Vt. 183; Woodrow v. O'Conner, 28 Vt. 776; Walsh v. Dart, 12 Wis. 635.

<sup>2</sup> Middlebury Coll. v. Cheney, 1 Vt. 348.

<sup>3</sup> Territt v. Woodruff, 19 Vt. 182; Woodrow v. O'Conner, 28 Vt. 776.

<sup>4</sup> Curtis v. Martin, 2 N. J. Law, 290.

<sup>5</sup> Van Buskirk v. Mulock, 18 N. J. Law, 184.

and has been ever since maintained.<sup>1</sup> And now, under the code of that State, the Supreme Court takes judicial notice of all foreign laws and statutes.<sup>2</sup> In a recent case in Rhode Island, the court took judicial notice of a law of the State of New York.<sup>3</sup> An exception should perhaps be made to the general rule, in so far that where a State recognizes acts done in pursuance of the laws of another State, the courts of the first State should take judicial cognizance of the said laws, so far as may be necessary to judge of the acts alleged to be done under them. And it has been so held.<sup>4</sup> In a case in Pennsylvania, it was held that a State court, when its judgment would be liable to review by the Supreme Court of the United States, in a case arising under the law of a sister State, would take judicial notice of such law.<sup>5</sup> It has been held in Kansas that the constitutions of sister States will be judicially noticed.<sup>6</sup> Where it is desired to introduce evidence of the laws of other States, it is, of course, necessary that they should be pleaded.<sup>7</sup>

§ 87. **Proof of the Unwritten Law of a Foreign State.**—Proof of the unwritten law of a foreign State may be made by the parol testimony of experts. This principle is everywhere recognized.<sup>8</sup> The ques-

<sup>1</sup> *Foster v. Taylor*, 2 Over. 191; *Coffee v. Neely*, 2 Heisk. 311; *Hobbs v. Railroad Co.*, 9 Heisk. 873.

<sup>2</sup> See *Hobbs v. Memphis, etc. R. R. Co.*, 56 Tenn. 874.

<sup>3</sup> *Paine v. Schenectady Ins Co.*, 11 R. I. 411.

<sup>4</sup> *Carpenter v. Dexter*, 8 Wall. 513.

<sup>5</sup> *State v. Hinchman*, 27 Pa. St. 479.

<sup>6</sup> *Butcher v. Bank*, 2 Kan. 70; *Dodge v. Coffin*, 15 Kan. 277.

<sup>7</sup> *Root v. Merriwether*, 8 Bush (Ky.), 401; *Peck v. Hibbard*, 26 Vt. 698.

<sup>8</sup> *Ennis v. Smith*, 14 How. 400, 426; *Baltimore, etc. R. R. Co. v. Glenn*, 28 Md. 287; *Hebard v. Myers*, 5 Ind. 94; *People v. Lambert*, 5 Mich. 349;

tion of the competency of the witness, the qualifications he must possess in order to give such testimony will be considered in a subsequent part of this chapter.

In many of the States it has been provided by statute that the unwritten law of other States may be proved not only by parol but also by the books of reports of cases adjudged in their courts.<sup>1</sup> And such reports have been received as evidence in Alabama, even in the absence of such statutes.<sup>2</sup>

§ 88. **Proof by Experts of the Written Law of Foreign States—Allowed in England.**—The practice in England, formerly was to require the production of the *written* law, and to exclude all proof of it by the testimony of experts. When it was proposed to call a person conversant with the law of Russia as to the right to stop goods *in transitu*, Lord KENYON refused to receive his testimony, and the distinction between written and unwritten law was taken. "Can the laws of a foreign country," he asks, "be proved by a person who may be casually picked up in the streets? Can a court of justice receive such evidence of such a matter? I shall expect it to be made out to me, not by such loose evidence, but by proof from the country whose laws you propose to

Merritt v. Merritt, 20 Ill. 65; McRae v. Mattoon, 13 Pick. (Mass.) 53; Owen v. Boyle, 15 Me. 147, 151; Tyler v. Trabue, 8 B. Mon. (Ky.) 306.

<sup>1</sup> See McClain's Ann. Code of Iowa (1888), vol. 2, p. 1466, § 4970; Statutes of Minnesota (1878), p. 800, § 58; Starr v. Curtis's Ann. St. of Ill., vol. 1, p. 1081, § 12; Sanborn & Berryman's Ann. St. of Wis. (1889), vol. 2, p. 2141, § 4138; Howell's Ann. St. of Mich., vol. 2, p. 1889, § 7509; Ann. St. of Kan., vol. 2, p. 1410, § 4465.

<sup>2</sup> Inge v. Murphy, 10 Ala. (N. S.) 885, 896, citing the following cases: Dougherty v. Snyder, 15 S. & R. 85; Raynham v. Canton, 3 Pick. 293; McRae v. Mattoon, 13 *Id.* 87; Lattimore v. Elgin, 4 Dess. 26.



give in evidence, properly authenticated.”<sup>1</sup> Lord ELLENBOROUGH also refused to receive parol evidence as to the law of Surinam, and declared that the law being in writing, an authenticated copy of it ought to be produced.<sup>2</sup> Chief Justice GIBBS, in a subsequent case, took the same distinction between the written and unwritten law, declaring that a copy of the former must be produced.<sup>3</sup> And Sir GEORGE HAY had, in 1776, refused to accept proof of foreign laws “by the opinions of lawyers, which is the most uncertain way in the world,” and required certificates of the laws to be laid before him.<sup>4</sup> But this doctrine is no longer observed in that country, and the rule is now to regard the law as being something distinct from statutory or common law taken by themselves merely. It is considered as a resultant of the *lex scripta* and *lex non scripta*, and as such it is to be proved as any other fact of science, by witnesses duly qualified by learning and experience. As early as 1811 the opinions of Scotch advocates were received to prove the law of Scotland, although they referred to printed authorities as forming the basis of their opinions.<sup>5</sup> It was not, however, until the year 1845 that the principle can be said to have become settled, of admitting expert testimony as to law considered as a complex resultant of the written law, and its interpretation and construction. In that year a French advocate was permitted to testify that the feudal law was abolished in Alsace, *de*

<sup>1</sup> *Boehtlinck v. Schneider*, 3 Esp. 58. This case criticised by Lord Denman, C. J., in *Baron De Bode's Case*, 8 Ad. & Ellis (N. S.) 208.

<sup>2</sup> *Clegg v. Levy*, 3 Camp. 166.

<sup>3</sup> *Millar v. Heinrick*, 4 Camp. 155.

<sup>4</sup> *Harford v. Morris*, 2 Hagg. 430.

<sup>5</sup> *Dalrymple v. Dalrymple*, 2 Hagg. 54.

*facto*, in 1789, by the revolution, and *de jure*, by the treaty of Luneville; and that a formal decree existed abrogating the feudal law.<sup>1</sup> Lord Chief Justice DENMAN, in sustaining the admission of the testimony in the above case, said: "There is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men; and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of the law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law. The witness is called upon to state what law does result from the evidence." COLERIDGE, J., in the same case, alludes to the difficulty of understanding the written laws of foreign countries possessing a different jurisprudence. And in the opinion of WILLIAMS, J., there is a suggestion as to the inability to obtain copies from the public authorities of foreign countries. The principle thus laid down was followed in *Earl Nelson v. Lord Bridport*,<sup>2</sup> where the court declares that although the written law is produced, and due proof made that it has not been repealed, varied, or fallen into disuse, and that the words have been accurately translated, "still the words require due construction, and the construction depends on the meaning of words to be considered with reference to other words not contained in the mere text of the law,

<sup>1</sup> Baron De Bode's Case, 8 Ad. & Ellis (N. S.) 208.

<sup>2</sup> 8 Beav. 527.

and also with reference to the subject-matter, which is not insulated from all others. The construction may have been, probably has been, the subject of judicial decision; instead of one decision, there may have been a long succession of decisions, varying more or less from each other, and ultimately ending in that which alone ought to be applied in the particular case." It is evident that as to such construction the evidence of experts is required for the instruction of the court. And Lord BROUGHAM declared in the House of Lords, in the celebrated *Sussex Peerage Case*:<sup>1</sup> "The witness may refer to the sources of his knowledge; but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it. If the *Code Napoleon* was before a French court, that court would know how to deal with and construe its provisions, but in England we have no such knowledge, and the English judges must, therefore, have the assistance of foreign lawyers." So in another case the court declares that the proper course to be pursued, in ascertaining the laws of a foreign country, is to call a witness expert in such laws, and "ask him, on his responsibility, what the law is, and not to read any fragment of a code, which would only mislead."<sup>2</sup> A person skilled in the laws of Bohemia was therefore permitted, against objection, to testify as to the written laws of that country.

<sup>1</sup> 11 Cl. & F. 85, 115.

<sup>2</sup> *Cocks v. Purday*, 2 C. & K. 269.



§ 89. **Manner of Proof in the United States of the Written Law of Foreign States.**—In this country a distinction is taken between the written and the unwritten law, and while the latter may be proven by the testimony of experts, the former can, in general, only be shown by the production of the written law itself, duly authenticated.<sup>1</sup> In an early case, Mr. Chief Justice MARSHALL said: “That no testimony shall be received that presupposes better testimony attainable by the party who offers it, applies to foreign law, as it does to all other facts.”<sup>2</sup> Upon this principle, the statute itself must be regarded as better evidence of what it contains, than is the testimony of any individual who, though he may know the general purport of the law, may not carry in his mind so minute and exact a knowledge thereof as is often necessary for its proper application.

In a case in the Supreme Court of Michigan in considering the English doctrine that written law may be proven by the parol testimony of a lawyer, that court has this to say of it: “In this country, at least,

<sup>1</sup> Zimmerman v. Hesler, 32 Md. 274; Kermott v. Ayer, 11 Mich. 181; Woodbridge v. Austin, 2 Tyler (Vt.), 364; Danforth v. Reynolds, 1 Vt. 265; Territt v. Woodruff, 19 Vt. 184; McNeill v. Arnold, 17 Ark. 154, 167, explaining Barkman v. Hopkins, 11 Ark. 168; Bowles v. Eddy, 33 Ark. 645; Emery v. Berry, 8 Foster (N. H.), 473; Comparet v. Jernegan, 5 Blackf. (Ind.) 375; Line v. Mack, 14 Ind. 330; Hoes v. Van Alstyne, 20 Ill. 202; McDeed v. McDeed, 67 Ill. 545; Lee v. Matthews, 10 Ala. 682; Innerarity v. Mims, 1 Ala. 660; Spaulding v. Vincent, 24 Vt. 501, 505; Gardner v. Lewis, 7 Gill (Md.), 379; Robinson v. Clifford, 2 Wash. C. C. 2; United States v. Otega, 4 Wash. C. C. 533; Ennis v. Smith, 14 How. (U. S.) 400, 426; Toulandon v. Lachenmeyer, 1 Sweeny (N. Y.), 45; Isabella v. Pecot, 2 La. Ann. 387; Raynham v. Canton, 3 Pick (Mass.), 293; Bryant v. Kelton, 1 Tex. 434; Willings v. Consequa, 1 Pet. C. C. 225; Kenny v. Clarkson, 1 Johnson (N. Y.), 385; Lincoln v. Battelle, 6 Wend. (N. Y.) 475.

<sup>2</sup> Church v. Hubbard, 2 Cranch, 187.

such a practice would be very unsafe; and there are reasons growing out of our peculiar federated system which would render it highly inexpedient to adopt any such course in regard to the laws of our sister States. Within a century, most of them were under the dominion of the same general common-law system, and their statutes are to be interpreted by similar rules. All of them are represented in Congress, and the laws of Congress are supposed to be susceptible of interpretation by any tribunal in the land. In our territorial condition we were bound by laws selected from all the old States, and our courts were expected to pass upon them. We have ready access to the reported decisions of courts, which are the only authorized exponents of their local statutes. Cases must certainly be rare in which the courts of one State cannot comprehend the statutes of another. The chief difficulty would arise between States where one is possessed of a common law and the other of a civil-law system. But in all cases it is safer to have the written law as a guide, whether it needs expounding or not.”<sup>1</sup>

The law being written, we have seen that the rule in this country is that there should be presented to the courts a copy of it, if it is possible to obtain a copy. But the question then arises how is proof to be made that it is a copy. The matter is quite gen-

<sup>1</sup> *People v. Lambert*, 5 Mich. 349, 362. But see *Barrows v. Downs*, 9 R. I. 453, where the court in the course of its opinion says: “There are many cases where the evidence of a professional person, or one skilled *virtute officii*, may be much more satisfactory evidence of what the law is, than the mere exemplification of the exact words of a foreign statute, which the court may not have the necessary knowledge to construe. And it seems to us, that the requiring an exemplified copy is pressing the rule of requiring the best evidence to an extent that would often defeat the ends of justice.”

erally regulated by statutory provision. The Revised Statutes of the United States provide that "The acts of the legislature of any State or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, territory, or country affixed thereto." <sup>1</sup>

The States may admit, as evidence, the written law of sister States, without the authentication required by the Act of Congress above referred to, but the statutes of one State thus authenticated *must* be admitted in the courts of every other State of the Union. <sup>2</sup>

In some States it is provided that the statute books of another State, *purporting to be published by the authority* of such State, may be received in evidence without further proof: <sup>3</sup> in others, the provision is that statute books of a sister State, *purporting or proved to be published by authority, or proved to be commonly admitted in the courts of such State*, may be received in evidence: <sup>4</sup> in some others, that statute books of other States, *purporting to be published by authority or commonly admitted in the courts of such State*, may be re-

<sup>1</sup> U. S. Rev. Stat., ed. of 1878, § 905.

<sup>2</sup> Taylor v. Bank of Illinois, 7 B. Mon. (Ky.) 576.

<sup>3</sup> Alabama Code of 1876, § 3045; Arkansas Dig. of Statutes (1858), ch. 67, § 2; Indiana, Rev. Stat. (1881), § 477; Illinois, Starr & Curtis's Ann. Stat. (1885), Vol. 1, p. 1080, § 10; Maine, Rev. Stat. (1871), p. 653, § 97; Maryland, Rev. Code (1878), p. 759, § 46; Rhode Island, Public Statutes (1882), p. 589, § 144; Tex. Rev. Stat. (1879), p. 329, § 2250.

<sup>4</sup> Florida, Bush's Dig. (1872), p. 547, § 357; Iowa, McClain's Ann. Code (1888), Vol. 2, § 4969; Kansas, Gen. Stat. (1889), Vol. 2, § 4465; Massachusetts, Gen. Stat. (1882), p. 943, § 71; New York, Code of 1871, § 426, and new Code, § 942; North Carolina, Battle's Revisal (1873), p. 233; Ohio, Rev. Stat. (1889), p. 1323, § 5244; Tennessee, 2 Statutes (1871), § 3800.



ceived.<sup>1</sup> Still another provision is that statute books of other States, *printed by authority or proved to be commonly admitted* in the courts of such State, may be read in evidence;<sup>2</sup> and in a few States the provision is that statute books, *printed by authority*, may be received without further proof.<sup>3</sup> In Louisiana the statutory provision is that the published *digests* and *statutes* of other States shall be received in evidence.<sup>4</sup> While in New Jersey the provision is so different from those in the statutes of other States that we give it entire.<sup>5</sup>

It is evident that in those cases in which provision is made for receiving the statute books of sister States, which are "commonly admitted," or "proved to be commonly admitted," in the courts of such States, the evidence of persons practicing in the

<sup>1</sup> Delaware, Rev. Code (1874), p. 652, § 6; Michigan, 2 Howell's Ann. St. § 7508; Minnesota, Statutes (1878), p. 800, § 57.

<sup>2</sup> Wisconsin, Sanborn & Berryman's Ann. St. (1889), Vol. 2, p. 2141, § 4136.

<sup>3</sup> Colorado, Gen. Laws (1867), p. 405, § 1078; Connecticut, Gen. Stat. (Rev. of 1875), p. 438, § 19; Georgia, Code of 1873, p. 671, § 3824; Kentucky, Gen. Stat. (1873), p. 413, § 21. And see 1 Rev. Stat. of Missouri (1879), p. 379, § 2272.

<sup>4</sup> Revised Statutes of 1870, p. 283, § 1440.

<sup>5</sup> "The printed statute books and pamphlet session laws of any of the United States, printed and published by the direction or authority of such State, shall be received as evidence of the public laws of such State, in any court of this State; and the court may determine whether any book or pamphlet, offered as such, was so printed or published, either from inspection, or the knowledge of the judge or judges, or from testimony; and no error shall be assigned for the rejection of any book or pamphlet, offered as such, unless it be proved on error that such book or pamphlet is received as a statute book or pamphlet containing the session laws of said State, in the courts of such State whose statute book or pamphlet containing the session laws it purports to be, nor shall any error assigned for the admission of such book or pamphlet be sustained, unless it be shown in support thereof that the statute offered in evidence, or some material part thereof, was not in force in such State at the time of the transaction or matter to which it was offered as pertinent or material." Revision (1709-1877), p. 381, § 22.

courts of those States would be received to authenticate the law, by showing that the book containing it is received in evidence in the courts of the State whose law it purports to be.

It has been held in Kentucky that these statutory provisions are to be regarded as cumulative, and that they do not repeal the common-law mode of proof.<sup>1</sup> But the Supreme Court of Michigan declares that foreign statutes should, when possible, be proved, as provided for in the State laws and the Acts of Congress, rather than by the testimony of a lawyer who practiced within the jurisdiction where they are in force.<sup>2</sup> Consequently in that State the written law cannot be proven by parol without some showing why secondary evidence is necessary,<sup>3</sup> and it is said that nothing but the impossibility of obtaining a copy—a case, the court remarks, not to be presumed among civilized nations—can excuse the non-production of such a copy.<sup>4</sup>

In a case decided in New York, the court refused to receive a book in the French language, purporting to contain the commercial code of France, and which was produced by the Chancellor of the French Consulate at New York, who testified that it was an exact copy of the laws furnished by the French government to its consul in New York.<sup>5</sup>

In the absence of all statutory provision regulating the mode of proof, it has been held that a copy of the foreign statute should be produced, which

<sup>1</sup> Biesenthall v. Williams, 1 Duval (Ky.), 330. And see Chamberlain v. Maitland, 5 B. Mon. (Ky.) 448.

<sup>2</sup> Kopke v. People, 43 Mich. 41.

<sup>3</sup> Kermott v. Ayer, 11 Mich. 181, 184.

<sup>4</sup> People v. Lambert, 5 Mich. 349, 360.

<sup>5</sup> Chanoine v. Fowler, 3 Wend. 173.

the witness can swear was recognized in the foreign country as authoritative.<sup>1</sup> So in an early case in Pennsylvania, the court received a printed copy of Irish statutes to show the law of Ireland, an Irish barrister having testified that he received the same from the King's printer, and that it was good evidence in that country.<sup>2</sup> And in England a book was received as evidence of the written law of France, which purported to be printed at the Royal Printing Office, and which the French Vice Consul produced, testifying that it contained the French code of laws upon which he acted, and that the office where it purported to be printed by authority of the government was the government printing office.<sup>3</sup> In New Jersey, prior to the adoption by that State of any statutory provision regulating the matter, the courts held that parol proof by an attorney, that the book was read and received in the courts of the other State as an authentic copy of their statutes, was not sufficient, but that it should be authenticated according to the Act of Congress, or by sworn copies from the original statutes.<sup>4</sup>

§ 90. **Proving the Written Law, in the Discretion of the Court, by the Testimony of Experts.**—The general rule of law in this country, therefore, is: That the unwritten law of a foreign State must be proved by the testimony of experts, that is, by those who are acquainted with the law, but that the written law of such a State is to be proven by a copy properly

<sup>1</sup> *Spaulding v. Vincent*, 24 Vt. 501, 505.

<sup>2</sup> *Jones v. Maffett*, 5 S. & R. 523.

<sup>3</sup> *Lacon v. Higgins*, 3 Starkie (N. P.), 178. See also, *Middleton v. Janverin*, 2 Hag. Cons. R. 437.

<sup>4</sup> *Van Buskirk v. Mulock*, 18 N. J. Law, 184, overruling *Hale v. Ross*, 3 N. J. Law, 373. See *Condit v. Blackwell*, 19 N. J. Eq. 193, 196.



authenticated.<sup>1</sup> It is clear, however, that such a rule as this may be varied by statute, and as a matter of fact it has been so varied in some of the States. Thus, in Delaware, Massachusetts, Minnesota and Wisconsin, the statutes provide as follows: "The existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence; but if it shall appear that the law in question is contained in a written statute or code, the court may, in their discretion, reject any evidence of such law that is not accompanied by a copy thereof."<sup>2</sup> The phraseology of the Kentucky and Maine statutes differ somewhat from the above provision. The Kentucky statute reads as follows: "The existence and the tenor or effect of all foreign laws beyond the limits of the United States may be proved by the parol evidence of persons learned in those laws. But if it appear that the law in question is contained in a written statute, the court may reject such parol evidence, unless it be accompanied by a copy of the statute."<sup>3</sup> While in Maine it runs as follows: "Foreign laws may be proved by parol evidence, but when such law appears to be existing in a written statute or code, it may be rejected unless accompanied by a copy thereof. The unwritten law of any other State or territory of the United States may be proved by parol evidence, and by books of reports of cases adjudged in their courts."<sup>4</sup>

<sup>1</sup> See the preceding section, and also *Pierce v. Indseth*, 106 U. S. 546. 551.

<sup>2</sup> Delaware Rev. Code (1874), p. 652, § 8; Massachusetts Gen. Stat. (1882), p. 993, § 73; Statutes of Minnesota (1878), p. 800, § 59; Wisconsin, Sanborn & Berryman's Ann. Stat., p. 2141, § 4139.

<sup>3</sup> Gen. Stat. (1873), p. 413, § 18.

<sup>4</sup> Rev. Stat. (1871), p. 653, § 98.

§ 91. **Expert Testimony as to the Construction and Interpretation of Written Law.**—The rule of law which requires the written law to be proven by an authenticated copy does not make incompetent the testimony of an expert as to the construction and interpretation placed on such law in the foreign State. In admitting such testimony in Alabama, as to the law of Louisiana, the court said: “The exposition, interpretation and adjudication may never have been evidenced by books or writings; but may, nevertheless, have become well understood, as the rule of law deduced by the court from the written words of the code upon a particular state of facts. Upon such a question, the testimony or opinions of competent witnesses instructed in the law of that State may be resorted to.”<sup>1</sup> In another case decided in Illinois, it is held that while the statute of a foreign State cannot be proved by parol, yet the construction given to such statute by the tribunals where they are in force, may be given in evidence by witnesses learned in such laws.<sup>2</sup> So in a case in Maryland, in which the Revised Statutes of New York had been received in evidence, a lawyer residing in the City of New York was allowed to give testimony as to the construction placed on the statute in question in New York.<sup>3</sup>

§ 92. **Presumption that Law is Unwritten.**—It has been held that, in the absence of evidence to the contrary, it will be presumed that the foreign law is unwritten, and that parol testimony of experts in such law will be received upon this assump-

<sup>1</sup> Walker v. Forbes, 31 Ala. 9.

<sup>2</sup> Hoes v. Van Alstyne, 20 Ill. 202.

<sup>3</sup> Consolidated Real Estate, etc. Co. v. Cashow, 41 Md. 59, 79.

tion. "These laws are generally difficult of proof. It would be a very expensive matter to prove them by copies authenticated. It, therefore, shall reasonably fall on the parties objecting to the parol proof, to show that the law was a written edict of the country."<sup>1</sup>

§ 93. **Presumption that the Law Remains Unchanged.**—When a witness testifies as to the foreign law, the question has been raised whether it is sufficient for him to show the law as it existed at a period prior to the time of which the trial court is inquiring, or whether it is necessary that his testimony should be addressed directly to the very time of the transaction in question. It has been held that, where the statute of a sister State is shown to have existed at a time prior to that of the transaction in question, it will be presumed, in absence of proof to the contrary, that it continued unchanged to the period in controversy.<sup>2</sup> But in a case in New York, when a printed copy of the French Code was presented, a witness, who had been licensed to practice in France in 1837, and ceased to practice in 1862, testified that at the time he practiced in France the book was commonly received by the judicial tribunals of that country as evidence of the existing law. The period for the existing law of which the trial court was seeking was in 1871, and the question was raised whether the law having been shown as it existed in 1862 could be presumed to have continued the same until the year 1871. This was not deter-

<sup>1</sup> Dougherty v. Snyder, 15 S. & R. (Penn.) 84, 87. And see Livingston v. Maryland Ins. Co., 6 Cranch, 274, 280.

<sup>2</sup> Peck v. Hibbard, 26 Vt. 698; Raynham v. Canton, 3 Pick. (Mass.) 29.



mined, but the court evidently had a serious doubt whether such presumption could be entertained.<sup>1</sup>

§ 94. **Who are Qualified to Testify as Experts in Foreign Law.**—In order to prove the law of a foreign country, it is necessary that the witnesses produced to testify in respect to it should be more than ordinarily capable of speaking upon the subject.

1. It is evident that one who has practiced law within the State, whose law is to be proven, is competent to testify in regard to the same.<sup>2</sup>

In a case in Maryland, the witness stated that he resided in New York City, and was by occupation a lawyer. The Court of Appeals, in passing on an objection to his competency, say: "This we regard as sufficient to enable him to testify as he has done. The objection, that he is not shown to be a lawyer practicing in New York, or informed of the law of that State, but merely that he is a lawyer and resides in New York, and for aught that appears may have practiced in another State only, is too refined to be tenable. The facts that he resides in New York, and is a lawyer by profession, authorizes, in the absence of opposing proof, the inference that he practices his profession in the State or city of his residence, and this makes him competent to testify respecting the matter about which he was examined."<sup>3</sup>

2. Persons who, because of some official position holden by them, are required to know the law of their domicile concerning the subject inquired about,

<sup>1</sup> *Hynes v. McDermott*, 82 N. Y. 41.

<sup>2</sup> *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59; *Layton v. Chalou*, 4 La. Ann. 318; *Mowry v. Chase*, 100 Mass. 79; *Wilson v. Carson*, 12 Md. 54; *Tyler v. Trabue*, 8 B. Mon. 306; *Wilson v. Smith*, 13 Tenn. 399; *McNeil v. Arnold*, 17 Ark. 154, 167; *Brewer v. Luth*, 28 Kan. 581

<sup>3</sup> *Consolidated Real Estate, etc. Co. v. Cashow*, 41 Md. 59, 80.

are competent to testify as to what that law is. It has, accordingly, been held in England, and the same ruling would, no doubt, be made in this country, that a person in the diplomatic service of Persia, and who is required to be thoroughly versed in the law of that country, might testify as to the law of Persia concerning the administration of estates.<sup>1</sup>

3. It has even been held that persons who, from their business relations, have become acquainted with the law of a foreign State, may be competent witnesses for the purpose of proving what such law is. Thus, a captain of a ship, trading with China, has been held competent to prove that the manufacture of saltpetre was prohibited in China.<sup>2</sup> And in a New Hampshire case, a witness who had long been extensively engaged in mercantile business in Canada, and in such employment had become acquainted with the law in relation to notarial instruments, was held competent to testify that it was part of the sworn duty of every notary in that country not to suffer any original paper, executed before him, to be taken out of his custody.<sup>3</sup> So in another case it was declared that "all persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts so far as expertness is required."<sup>4</sup> The question which this case involved, related to the Belgian law on the subject of the presentment of promissory notes, and the point raised was whether a witness called as an expert to testify as to such law, must be a professional man; one who, by virtue of his office,

<sup>1</sup> *De Dost Aly Khan*, 6 Prob. Div. 6.

<sup>2</sup> *Wilcocks v. Phillips*, 1 Wall. Jr. 49.

<sup>3</sup> *Pickard v. Bailey*, 26 N. H. 152, 171.

<sup>4</sup> *Vander Donckt v. Thellusson*, 8 Man. G. & S. (65 E. C. L.) 812.

might be said to be *peritus*. It was held not, and one who had been a merchant and stock-broker at Brussels, was permitted to testify as an expert. "I think," said Mr. Justice MAULE, "that inasmuch as he had been carrying on a business which made it his interest to take cognizance of the foreign law, he does fall within the description of an expert." And in a case in the Supreme Court of Pennsylvania, it was held that the law of a foreign country on a given subject might be proven by any person, who, though not a lawyer, or not having filled any public office, was or had been in a position to render it probable that he would make himself acquainted with it. The court, therefore, held that a pastor of a church in a foreign country could be permitted to testify that the church records had been kept according to the laws of that country.<sup>1</sup> In the same way a Roman Catholic bishop, who had resided in Rome and studied church law and Roman law, has been allowed to testify concerning the matrimonial law of Rome.<sup>2</sup> And in accordance with this principle our courts have allowed a priest or minister from another State to testify as to the matrimonial law of such State.<sup>3</sup>

4. In some cases the doctrine is even more broadly stated, and it is said that the testimony of any person who appears to be well informed on the point is admissible. Thus the New Hampshire court says: "In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on the

<sup>1</sup> American Life Ins. Co. v. Rosenagle, 77 Pa. St. 507.

<sup>2</sup> Sussex Peerage Case, 11 Cl. & F. 134.

<sup>3</sup> Bird v. Commonwealth, 21 Gratt. (Va.) 800, 808. And see Phillips v. Gregg, 10 Watts (Penn.), 158, 169.



point, is competent.”<sup>1</sup> This statement is a mere *dictum* not required by any question before the court, as the witnesses whose testimony was the matter in dispute were lawyers.

In a Pennsylvania case, it is said that the foreign law “may be proved by professional men, or *others* conversant with, and having the *means of knowledge*.”<sup>2</sup> In Texas, the practice has long prevailed of receiving the evidence of intelligent Mexicans, not lawyers, as to the laws of Spain and Mexico in litigation pertaining to lands, and such evidence is pronounced by the courts of that State to have been “valuable in giving information as to the construction given to the laws of Spain and Mexico by the officers who executed them.”<sup>3</sup> In an early case in New York, Mr. Justice SPENCER declares that “courts of law will receive evidence of the common law from intelligent persons of the country whose laws are to be proved.”<sup>4</sup> The language of the New York case is a mere *dictum*, as all that was decided was that a foreign statute could not be proven by parol. Neither does it appear who would be regarded as an “intelligent” person within the meaning of the expression used. And in Illinois it is said that it may be proven by the testimony of competent witnesses instructed in its laws.<sup>5</sup> But in this Illinois case the testimony was given by practitioners of the law of more than twenty years’ standing, and the words used do not necessarily imply that persons who were not lawyers would be allowed to testify.

<sup>1</sup> Hall v. Costello, 48 N. H. 176, 179.

<sup>2</sup> Jones v. Maffett, 5 Serg. & R. (Penn.) 523, 532.

<sup>3</sup> State v. Cuellar, 47 Tex. 304.

<sup>4</sup> Kenney v. Van Horne, 1 Johns. (N. Y.) 394.

<sup>5</sup> Milwaukee & St. Paul R. R. Co. v. Smith, 74 Ill. 197.

The principle which would allow any person, who claims to know the foreign law, to give testimony concerning it in a court of justice seems unjustifiably lax. There can be no necessity for receiving such testimony, and it ought not to be admitted. A witness, to be competent to testify on a question of foreign law, should be an *expert*, and it is as necessary that he should be such as it is that a witness should be an expert in order to give testimony on a question of medical science. We have seen in another part of this work<sup>1</sup> that a witness cannot testify as an expert on a particular matter when that particular matter does not pertain to his special calling or profession, and his knowledge of the subject of inquiry has been derived from study alone. And so a witness who is not a member of the legal profession, or a public officer who is required to know the law, or some person like an ecclesiastic who knows the law pertaining to his department, or a person engaged in a certain business which requires him to possess a certain knowledge of the matter in hand, should not be allowed to give testimony on a question of foreign law.

The *dictum* of the New Hampshire court, if followed, would often lead to disastrous results that would subject the administration of the law to deserved reproach. The English rule, as will be seen in the section which follows, is opposed to any such loose doctrine. In a case in Michigan, which involved the marriage laws of New Jersey, a person who had been a policeman and constable in the latter State, and who did not swear to any general knowledge of the laws of that State, but said he had,

<sup>1</sup> Section 19.

on account of a difficulty with his own wife, looked into those laws, was allowed, in the court below, to testify what the written laws of New Jersey were in regard to marriage. The Supreme Court held the witness to be incompetent, saying: "In regard to the law of marriage, his means of knowing the law were those of any other citizen, and no more." The court calls attention to the English rule requiring the witness to be an expert, and thinks it would be a reproach to the law to regard persons with slight qualifications as experts to give testimony on such matters.<sup>1</sup>

§ 95. **Who are Qualified to Testify as Experts in Foreign Law —The Rule in England.**—In England, a more rigid rule has, in some cases, been applied in determining the qualifications of persons to give expert testimony on the science of law. In one case the Master of the Rolls refused to act on the affidavit of one describing himself as a "Solicitor practicing in the Supreme Courts of Scotland, Edinburgh," and required the opinion of an advocate as to the Scotch law.<sup>2</sup> There is an English case in which it was held that one who was not a lawyer, and who had no special qualifications, but who had resided in Scotland for twenty years, and who swore that he was acquainted with the law of marriage, was competent to state what the Scotch law of marriage was.<sup>3</sup> It did not appear that the witness had any peculiar means of information as to the law. But this case has been disapproved, and does not seem to be re-

<sup>1</sup> *People v. Lambert*, 5 Mich. 349.

<sup>2</sup> *In re Todd*, 19 Beav. 582. The opinions of Scotch advocates were also received in *Williams v. Williams*, 3 Beav. 547, and in *Hitchcock v. Clendinen*, 12 Beav. 534.

<sup>3</sup> *Regina v. Dent*, 1 C. & K. (47 E. C. L.) 96.



garded as the law. In the *Sussex Peerage Case*, in the House of Lords, the Lord Chancellor, in speaking of the case, said: "I ought to say at once that it is the universal opinion both of the Judges and the Lords that the case is not law."<sup>1</sup> But while that case was thus emphatically repudiated, it was at the same time held, as stated in the preceding section, that a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in England, was to be considered, by virtue of his office, as a person skilled in the matrimonial law of Rome, and, therefore, competent as a witness to prove that law. The Lord Chancellor declared that the witness came within the description of a person *peritus virtute officii*. The English courts, too, have held, as we have seen, that the Persian ambassador at Vienna might testify as an expert in the law of Persia; but this was after he had testified that in Persia there were no professional lawyers; that the administration of the law was left entirely to ecclesiastics, and that all persons in the diplomatic service of that country were required to be thoroughly versed in the law; and that he had, therefore, studied and become acquainted with it.<sup>2</sup>

In 1861, the British Parliament passed a very wise and useful act, by which it was intended that all questions of foreign law should be referred to the courts of the foreign country to be there decided and certified back.<sup>3</sup>

<sup>1</sup> *Sussex Peerage Case*, 11 Cl. & F. 85.

<sup>2</sup> *The Goods of Dost Aly Khan*, 6 Prob. Div. (L. R.) 6.

<sup>3</sup> "If, in any action depending in any court of a foreign country or State, with whose government Her Majesty shall have entered into a convention as above set forth (*i. e.*, for the purpose of mutually ascertaining the law), such court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of Her

\* § 96. **Where Knowledge of the Foreign Law Must Have Been Acquired.**—It has been held in several cases, that where the knowledge of a witness produced as an expert in foreign law has not been acquired in the foreign country, such person is not to be regarded as competent, and his testimony cannot be received. Thus, it has been held in England, that a witness was incompetent to testify, who stated that he was a jurisconsult, and adviser to the Prussian Consul in England, and had studied law in the University of Leipsic, and that from his studies there he was able to say that the Code Napoleon was the law of Cologne. The court declared that one who never had been in the foreign State, and whose knowledge of the law was not derived there, was incompetent to testify as an expert in the foreign law.<sup>1</sup> And where one described himself as “a certified special pleader, and as familiar with Italian law,” he was not allowed to testify that the office of curator

Majesty’s dominions, and if the foreign court in which such action may depend, shall remit to the court in Her Majesty’s dominions whose opinion is desired, a case setting forth the facts and questions of law arising out of the same, on which they desire to have the opinion of a court within Her Majesty’s dominions, it shall be competent to any of the parties to the action to present a petition to such last mentioned court, whose opinion is to be obtained, praying such court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this act, or to pronounce their opinion without hearing parties or counsel; and the court to which such petition shall be presented shall consider the same, and if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce their opinion upon the questions of law, as administered by them, which are submitted to them by the foreign court; and in order to their pronouncing such opinion, they shall be entitled to take such further procedure thereupon as to them shall seem proper, and upon such opinion being pronounced, a copy thereof, certified by an officer of such court, shall be given to each of the parties to the action by whom the same shall be required.” 24 & 25 Vict., ch. 11. See *Law Magazine and Review*, London, May, 1882, and 8 *Southern Law Review*, 153.

<sup>1</sup> *Bristow v. Sequeville*, 5 Excheq. 272.

in Italy was as nearly as possible identical with that of an administrator in England, the ground for his exclusion being that there was nothing "to show that he had any knowledge of Italian law, but from the study of it in this country" (England).<sup>1</sup> So an English barrister practicing in Canadian Appeals before the Privy Council, has been held incompetent in England to give evidence as an expert as to the validity, according to the law of Canada, of a marriage solemnized in that country.<sup>2</sup> In this country, a witness who showed himself to be instructed in the laws, customs and usages of Spain, and who was a legal practitioner in the Island of Cuba, which is governed by Spanish law, was held competent to prove the law of Spain, although he never resided or practiced in the latter country.<sup>3</sup> And in another case a witness who had never been admitted to the French bar was held competent to testify as to the law of France, but he had studied the law as a profession and been graduated from the University of Paris, and was at the time of giving his testimony employed by the French government as legal adviser of the legation at Washington.<sup>4</sup>

§ 97. **Right of Expert to Cite Text Books, Decisions, Codes, etc.**—When a lawyer or expert in foreign law is allowed to testify as to the law, assuming it to be a resultant of the *lex scripta* and the *lex non-scripta*, he may confirm his recollection of the law, or assist his own knowledge by reference to text books, decisions, statutes, codes, or other legal documents.<sup>5</sup>

<sup>1</sup> The Goods of Bonelli, 1 Prob. Div. (L. R.) 69.

<sup>2</sup> Cartwright v. Cartwright, 26 W. R. 684.

<sup>3</sup> Molina v. United States, 6 Ct. of Cl. 269.

<sup>4</sup> Dauphin v. U. S., 6 Ct. of Cl. 221.

<sup>5</sup> See Barrows v. Downs, 9 R. I. 446.



And if he describes them as truly stating the law, they may be read, not as evidence *per se*, but as part and parcel of his testimony.<sup>1</sup>

§ 98. **How these Citations are to be Regarded.—**

It has been said in England that in the first instance, at least, the judge can only regard the citation of the laws and authorities contained in the opinions of the experts, as connected with the testimony, and that he cannot consider them as at all important, except with regard to the degree of weight given by the testimony. That if he reads them they may appear to him to accord with the testimony, or to differ from it. "If, in his view, they accord with it, nothing is gained. If, in his view, they differ from it, he, being ignorant of the foreign law, cannot weigh his opinion against the clear and uncontradicted opinion of the witness whose opinion ought to be derived, not only from the citation in question, but from all the sources of his knowledge of the law of which he is speaking."<sup>2</sup> And in the *Duchess Di Siora's Case* in the House of Lords, Lord Chelmsford declares that it seems contrary to the nature of the proof required, that the judge should be at liberty to search for himself into the sources of knowledge from which the witnesses have drawn, and produce for himself the fact which is required to be proved as a part of the case.<sup>3</sup> But where the opinions of the experts are unsatisfactory and contradictory, the court is at liberty to examine for itself the laws and authorities cited by the witnesses as the basis or foundation for their opinions. Thus, in

<sup>1</sup> See Taylor on Ev. § 1423; *Nelson v. Bridport*, 8 Beav. 527, 538; *Sussex Peerage Case*, 11 Cl. & Fin. 114, 117.

<sup>2</sup> *Nelson v. Bridport*, 8 Beav. 527, 541.

<sup>3</sup> 10 House of Lords' Cases, 640.

a case before the Privy Council when the judges said the evidence of the experts was not satisfactory, they laid down a rule correctly stated by the reporter in a marginal note as follows: "Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law; but where the evidence of the experts is unsatisfactory and conflicting, the appellate court, not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign courts and the text writers, in order to arrive at a satisfactory conclusion upon the question of foreign law."<sup>1</sup> In a case in 1889, before the Chancery Division of the English court the question was again raised, and COLTON, L. J., disposed of it as follows: "In our courts, foreign law is a matter of fact to be decided on evidence, and the proper evidence is that of experts, that is to say, of advocates practicing in the courts of the country whose law our courts want to ascertain. It was urged on behalf of the respondent that all we can do is to look at the affidavits of the experts, and that if the law on any particular point is not laid down in them, then we have no evidence what the foreign law on that point is, and that then, if the appellant's case depends on the law on that particular point, she has not established it, and her appeal must fail. Now, as I have said, the proper evidence of the law of any foreign country is evidence by lawyers of that country, but if in their evidence they refer to passages in the code of the country whose law we are endeavoring to ascertain, it would, as it appears to me, be most unreasonable

<sup>1</sup> *Brewer v. Freeman*, 10 Moore, P. C. 306.

to hold that we are not at liberty to look at those passages and consider what is their proper meaning.'"<sup>1</sup> And while all the judges concurred entirely in the above statement, LOPES, L. J., took occasion to add the following: "It was said that the court could not look at the provisions of the civil code of *Peru* and form any opinion as to the meaning of any of its provisions. I believe the rule in such a case to be that if an expert witness called to prove foreign law states that any text book, decision, code, or other legal document truly represents that law, then the court is at liberty to regard the legal document to which he refers, not as evidence *per se*, but as part of the testimony of the witness, and to deal with it, and give the same effect to it, as to any other portion of the evidence of the expert witness."

§ 99. **Whether the Question of Foreign Law is for the Court or Jury.**—As courts do not take judicial notice of foreign laws, unless expressly authorized by statute to do so, the foreign law must be proved as a fact, and the question arises, when one learned in the foreign law testifies in regard to the same, whether the testimony thus given is addressed to the court for its information as law, or to the jury to be passed on by them as a question of fact. The authorities are not in harmony as to the true rule to be observed in such cases. Some of the authorities announce that the evidence of the existence of a foreign law is to be addressed to the court,<sup>2</sup> and

<sup>1</sup> *Concha v. Murrieta*, L. R. 40 Ch. Div. 543, 550.

<sup>2</sup> *Ferguson v. Clifford*, 37 N. H. 86; *Wilson v. Carson*, 12 Md. 54, 75; *Bank v. Barry*, 20 Md. 287, 295.



such is the opinion of Greenleaf and Story.<sup>1</sup> But other authorities hold that the evidence is for the jury.<sup>2</sup> There is authority for saying, that when the foreign law is written and is authenticated in the manner provided for by the Act of Congress or the statutes of the State, the testimony is addressed to the court, and the jury are not concerned with it. But if the law is unwritten, its existence being proved by the parol testimony of witnesses, the jury must then pass on the credibility of the witnesses and find whether its existence be proven.<sup>3</sup>

It has sometimes been supposed that the interpretation or construction of foreign law is also a matter of fact for the jury.<sup>4</sup> But we think that the great weight of authority is the other way, and that the meaning of the law is for the court.<sup>5</sup> "What is the law of another State, or of a foreign country," says the Supreme Court of North Carolina, "is as much a 'question of law,' as what is the law of our own State."<sup>6</sup>

In Massachusetts the rule is that when the evidence consists of the testimony of experts as to the existence *or* prevailing construction of a statute, the jury must determine what the law is,<sup>7</sup> but if it con-

<sup>1</sup> Greenl. on Ev. § 486; Story on Conflict of Laws, § 638.

<sup>2</sup> *Charlotte v. Chouteau*, 33 Mo. 194; *Cobb v. Griffith*, 87 Mo. 90, 94; *Holman v. King*, 7 Met. (Mass.) 384; *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 549; *Dyer v. Smith*, 12 Conn. 385; *State v. Jackson*, 2 Dev. (N. C.) 563; *Ingraham v. Hart*, 11 Ohio, 255.

<sup>3</sup> See *Kline v. Baker*, 99 Mass. 253, 254; *Hooper v. Moore*, 5 Jones N. C. Law, 130, 134; *Bock v. Lauman*, 24 Pa. St. 435, 445.

<sup>4</sup> *Moore v. Gwyn*, 5 Ired. (N. C.) 187.

<sup>5</sup> *Cobb v. The Griffith, etc. Co.*, 87 Mo. 94; *Bock v. Lauman*, 24 Pa. St. 435, 446; *Consequa v. Willings*, 1 Pet. C. C. 225; *Sidwell v. Robert*, 1 Pa. 283; *Lockwood v. Crawford*, 18 Conn. 361; *State v. Jackson*, 2 Dev. (N. C.) 563; *Inge v. Murphy*, 10 Ala. (N. S.) 885.

<sup>6</sup> *Hooper v. Moore*, 5 Jones N. C. Law, 130, 132.

<sup>7</sup> *Kline v. Baker*, 99 Mass. 253, 254.

sists of a single statute or judicial opinion, the question of its construction is for the court.<sup>1</sup>

§ 100. **Testimony as to Usage and Practice of Courts of Another State.**—Lawyers are permitted to testify in the courts of another State, as to the usage and practice of the courts in the State in which they practice.<sup>2</sup> In the case cited, the depositions of lawyers and judges of Rhode Island were received in the courts of Massachusetts, to show that the service of a writ of arrest in the manner set forth in the officer's return was a good and valid service under the practice and usage of the courts of Rhode Island, giving the courts of that State jurisdiction, and that a judgment concluded on such service would be valid there. It amounted to proof of the unwritten law. But the rule allowing experts to testify does not enable a party to call lawyers to testify what is the practice of the profession, under a certain statute of the State, for the purpose of guiding the judge in the construction to be given to it, in cases where the question arises in the courts of the State which enacted the statute.<sup>3</sup>

§ 101. **Testimony as to Powers and Obligations of an Attorney in his Relations to his Clients.**—It is error to receive the opinions of lawyers as to the rights and duties of an attorney as between himself and his client.<sup>4</sup> In the particular case, it was held error to receive the opinions of such witnesses as to whether, in a certain state of facts, an attorney should, as a matter of course and of duty, have

<sup>1</sup> *Ely v. James*, 123 Mass. 36, 44.

<sup>2</sup> *Mowry v. Chase*, 100 Mass. 79.

<sup>3</sup> *Gaylor's Appeal*, 43 Conn. 82.

<sup>4</sup> *Clussman v. Merkel*, 3 Bosw. 402, 409.

moved for a reference, and whether he had or had not a right, in the discharge of his legal and proper duty, to open a default.<sup>1</sup>

§ 102. **The Value of Legal Services.**—The subject of the testimony of experts as to the value of legal services performed is considered in another connection and need not be referred to here.<sup>2</sup>

<sup>1</sup> See section 11.

<sup>2</sup> See Chapter VIII.



## CHAPTER VI.

## EXPERT TESTIMONY IN THE TRADES AND ARTS.

## SECTION.

103. Testimony of Nautical Men.
104. Testimony of Railroad Men.
105. Testimony of Insurance Men.
106. Testimony of Civil Engineers.
107. Testimony of Surveyors.
108. Testimony of Millers and Mill-wrights.
109. Testimony of Machinists.
110. Testimony of Mechanics.
111. Testimony of Masons.
112. Testimony of Farmers and Gardeners.
113. Testimony of Cattlemen.
114. Testimony of Painters and Photographers.
115. Testimony of Lumbermen.
116. Testimony of Experts in Patent, Trade-mark and Copyright Cases.
117. Testimony of Business Men as to Usage.
118. Testimony as to Technical Terms and Unusual Words.
119. Translation by Experts of Writings from a Foreign Language.
120. Opinions of Experts in Miscellaneous Cases.

§ 103. **Testimony of Nautical Men.**—The opinions of persons engaged in the navigation of vessels and boats are received on questions pertaining to nautical science. “Such men form their opinions from facts within their own experience, and not from theory or abstract reasoning. They come, therefore, even more properly within the definition of experts

than men of mere science.''<sup>1</sup> Their opinions have been received as to the sea-worthiness of vessels;<sup>2</sup> as to what caused a vessel to leak;<sup>3</sup> as to the soundness of a chain cable;<sup>4</sup> as to the possibility of avoiding a collision by the use of proper care on the part of the officers and crew of one of the vessels;<sup>5</sup> as to whether a port could have been made by skillful management;<sup>6</sup> as to whether a vessel was stranded through unskillful and careless management, or inevitable accident;<sup>7</sup> as to the proper mode and time of changing the fastening of boats in a tow;<sup>8</sup> as to whether it would be safe or prudent for a tugboat, on any wide water, to tug three boats abreast, with a high wind;<sup>9</sup> and also as to the practical effect produced on a ship by cross seas and heavy swells, shifting winds and sudden squalls.<sup>10</sup> Experienced river navigators, who knew both boats, have been allowed to testify as to what would be the probable effect on one boat of the

<sup>1</sup> Delaware, etc. Steam Towboat Co. v. Starrs, 69 Pa. St. 36, 41. And see Clark v. Detroit Locomotive Works, 32 Mich. 350.

<sup>2</sup> Beckwith v. Sydebotham, 1 Camp. 117; Baird v. Daly, 68 N. Y. 548; Patchin v. Astor Mutual Ins. Co., 13 N. Y. 268; Western Ins. Co. v. Tobin, 32 Ohio St. 77, 94. The certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of sea-worthiness at that time, if supported by his oath that he examined the vessel, and has no doubt that the facts stated in it are true, although he has no independent recollection of the facts. Perkins v. Augusta Ins. Co., 10 Gray, 312.

<sup>3</sup> Parsons v. Manuf., etc. Ins. Co., 16 Gray, 463. See, too, Zugasti v. Lamer, 12 Moore P. C. 331, 336.

<sup>4</sup> Reed v. Dick, 8 Watts (Penn.), 479.

<sup>5</sup> Jameson v. Drinkald, 12 Moore, 148; Fenwick v. Bell, 1 Car. & Kir. (47 Eng. C. L. 311) 312; Carpenter v. Eastern Transportation Co., 71 N. Y. 574; Spickerman v. Clark, 9 Hun, 133.

<sup>6</sup> Dolz v. Morris, 17 N. Y. Sup. Ct. 202, 203.

<sup>7</sup> New England Glass Co. v. Lovell, 7 Cush. (Mass.) 319, 322.

<sup>8</sup> Delaware, etc. Steam Towboat Co. v. Starrs, 69 Pa. St. 36, 41.

<sup>9</sup> Transportation Line v. Hope, 95 U. S. 297.

<sup>10</sup> Walsh v. Washington Marine Ins. Co., 32 N. Y. 427.

waves or swells of another and very large boat—that it would have a tendency to open the seams of the outriggers, and cause the caulking to fall out, which would have a tendency to let water in.<sup>1</sup> The opinions of nautical experts have also been received as to the proper management of a ship.<sup>2</sup> And experienced navigators who were acquainted with the nature and extent of obstructions in the waters navigated, and the dangerous character of their navigation, have been held competent to express an opinion as to the probable cause of the loss of a vessel.<sup>3</sup> In cases of collision, where the question is as to the direction from which the blow appeared to have come, the opinions of nautical experts have also been received.<sup>4</sup> In the case cited, the court say: “It may easily be perceived how an experienced boatman could judge of the direction of the body in motion, that displaced a portion of the plank and timbers of the injured vessel, as a surgeon can tell from what quarter a blow has been aimed that inflicts a wound upon the person; but a mere description of the broken fragments, in the one case, or the lacerated integuments in the other, will seldom, if ever, enable a jury to say how the disturbing cause made its approach.” Nautical experts may be permitted to testify as to what is a full cargo for a ship to carry with safety,<sup>5</sup> and to express an opinion as to the effect of a deck load upon the safety of a vessel.<sup>6</sup> They have been allowed to state that the opening of the

<sup>1</sup> *Western Ins. Co. v. Tobin*, 32 Ohio St. 77, 97.

<sup>2</sup> *Guiterman v. Liverpool, etc. Steamship Co.*, 83 N. Y. 358.

<sup>3</sup> *Western Ins. Co. v. Tobin*, 32 Ohio St. 77, 92.

<sup>4</sup> *Steamboat v. Logan*, 18 Ohio, 375. And see *Zugasti v. Lamer*, 12 Moore P. C. 331, 336.

<sup>5</sup> *Ogden v. Parsons*, 23 How. 167.

<sup>6</sup> *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1.



garboard seam in a vessel was due to the working of the stem.<sup>1</sup> Upon the question of negligence in mooring a vessel, the ship's keeper has been held competent to testify as an expert, as to the conditions of the fastenings of the vessel as to safety.<sup>2</sup> A shipwright who has examined a decayed vessel may give his opinion, founded on the condition of the timbers at the time of his examination, whether a person could have removed a part of the "thick streak" some months before, without discovering that the timber under it was decayed.<sup>3</sup> The opinion of nautical experts are admissible upon the question whether an injured boat was worth repairing.<sup>4</sup> But it has been held that one experienced in raising sunken boats and repairing them, and who was acquainted with the boat in question, could not express an opinion as to what would be the expense of raising and repairing it; that he might state the particulars, but the jury should compute the expense, as it was a matter not lying peculiarly within the knowledge of experts.<sup>5</sup> On the other hand, one who had worked in a ship-yard, and had been the owner of vessels, has been permitted to testify as to the difference in value of a vessel as repaired, and what her value would have been, if repaired according to contract.<sup>6</sup> And an expert in the wrecking business has been allowed to state whether a sunken tug, which he had examined, could be raised as a whole, and to express an opinion as to its value when raised

<sup>1</sup> Paddock v. Commonwealth Ins. Co., 104 Mass. 521, 529.

<sup>2</sup> Moore v. Westervelt, 9 Bos. (N. Y.) 559.

<sup>3</sup> Cook v. Castner, 9 Cush. (Mass.) 266.

<sup>4</sup> Steamboat v. Logan, 18 Ohio, 375.

<sup>5</sup> Paige v. Hazard, 5 Hill (N. Y.), 604.

<sup>6</sup> Sikes v. Paine, 10 Ired. (N. C.) Law, 282.

in comparison with the cost of raising it.<sup>1</sup> Sailing rules and regulations, prescribed by law, of course, furnish the paramount rule of decision upon questions of navigation. But where in any case a disputed question of navigation arises, in regard to which neither the law nor the rules of the court regulating admiralty practice have made provision, then the evidence of nautical experts is admissible as to the general usage in such cases.<sup>2</sup> Experienced navigators and masters of vessels have been permitted to express an opinion that a deposit of coin under the ballast, or under the cargo, was unusual, and increased the hazards and risk of loss to which the coin was exposed.<sup>3</sup> So one who has followed the sea for forty years has been allowed to express an opinion as to whether an article was properly stowed on a boat.<sup>4</sup> "What is a competent crew for the voyage; at what time such crews should be on board; what is proper pilot ground; what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage; are questions of fact dependent on nautical testimony."<sup>5</sup>

A pilot who knew the place of the disaster, and the pilot in charge of the boat at the time, have been held competent to testify as to whether it was proper to suffer the pilot to pilot the boat at the time and

<sup>1</sup> *Blanchard v. New Jersey Steamboat Co.*, 3 N. Y. Sup. Ct. 771.

<sup>2</sup> *The City of Washington*, 92 U. S. 31.

<sup>3</sup> *Leitch v. Atlantic Mutual Ins. Co.*, 66 N. Y. 190, 106; s. c., 5 Ins. L. J. 775.

<sup>4</sup> *Price v. Powell*, 3 N. Y. 322.

<sup>5</sup> *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 183, per Mr. Justice Story.

place of the accident.<sup>1</sup> And a mate of a steamboat who had been engaged eight or ten years in navigation, and who saw the collision in question, has been allowed to testify that the sunken boat was not carrying a proper light at the time of the accident.<sup>2</sup> But one who is not an expert is incompetent to express an opinion as to the sea-worthiness of a floating dock.<sup>3</sup> Where it was claimed that the length of the shaft caused a boat to settle by the stern, and the journals to heat and bind, it was held that an expert could be asked whether the boat settled more than it ought to, or than was usual.<sup>4</sup> In the same case it was held that an expert could not be allowed to express an opinion as to the course which the owner of a steamer ought, as a prudent man, to take as to the laying up for examination and repairs on discovering defects in the engine.

Expert testimony as to whether under the circumstances it was the exercise of good seamanship and prudence to attempt to have a vessel, which had sprung a leak, towed to her place of destination, instead of putting in to a near port for repairs, has been held admissible.<sup>5</sup> And a question has been allowed which asked a nautical expert whether, on the evidence already given, he was of the opinion that a collision between the ships could have been avoided by proper care on the part of the defendant's servants.<sup>6</sup> When the question was whether the crew of a boat at a particular time were sufficient to properly run her, the opinion of a boatman has been

<sup>1</sup> Hill v. Sturgeon, 28 Mo. 323.

<sup>2</sup> Weaver v. Alabama, etc. Co., 35 Ala. 176.

<sup>3</sup> Marcy v. Sun Ins. Co., 11 La. Ann. 748.

<sup>4</sup> Clark v. Detroit Locomotive Works, 32 Mich. 348.

<sup>5</sup> Union Ins. Co. v. Smith, 124 U. S. 405.

<sup>6</sup> Fenwick v. Bell, 1 C. & K. 312.



held admissible.<sup>1</sup> The opinion of lumbermen and pilots have been held admissible on the question whether a place in a river where a raft was moved was a safe place to move it.<sup>2</sup> The opinion of a nautical expert has been received on the question whether it was good seamanship to leave a barge moored with a falling tide.<sup>3</sup> And the opinion of a harbor master who had observed the vessel at the time has been held admissible on the question whether a vessel in entering the harbor had been skillfully handled by the sailing master.<sup>4</sup> The opinion of a ship captain has been received as to the necessity for a jettison,<sup>5</sup> and whether a vessel could prudently take more than a certain amount of cargo.<sup>6</sup>

A witness who had been an engineer and an assistant engineer on different steamers, was familiar with the operation of tugs about the harbor, and who at the time of the accident, and for some years prior, was foreman of an elevator, and during that time had frequent and constant opportunities of observing the way in which the tug brought vessels into the wharf at the elevator, has been held competent to give an opinion, as an expert, upon the state of the case as he observed it, as to whether a vessel was skillfully or negligently brought to the pier by the captain of the tug.<sup>7</sup> The opinion of a boat builder has been received as to the damage done to a boat negligently run down and sunk.<sup>8</sup>

<sup>1</sup> *McCreary v. Turk*, 29 Ala. 244.

<sup>2</sup> *Hayward v. Knapp*, 23 Minn. 430.

<sup>3</sup> *Leary v. Woodruff*, 76 N. Y. 617.

<sup>4</sup> *Ward v. Salisbury*, 12 Ill. 369.

<sup>5</sup> *Price v. Hartshorn*, 44 Barb. 655; 44 N. Y. 94.

<sup>6</sup> *Weston v. Foster*, 2 Curt. C. C. 119.

<sup>7</sup> *Baltimore Elevator Co. v. Neal*, 65 Md. 438.

*Paige v. Hazard*, 5 Hill, 603.

§ 104. **Testimony of Railroad Men.**—An experienced railroad man, who has made a business of the running and management of railroads, is as fairly an expert as one skilled in any other art, and he may give testimony as an expert in questions of railroad management. The running and management of railways is so far an art, outside of the experience and knowledge of ordinary persons, as to render the opinions of persons skilled therein admissible in evidence.<sup>1</sup> The testimony of such witnesses has been received in numerous cases.

*Engineers.* — A locomotive engineer has been allowed to testify as to the speed that is usual and considered safe in “backing” an engine drawing a train after dark, and to state the effect of an engine striking an animal, when running backward, and explain the structure of a locomotive tender.<sup>2</sup> An engineer in charge of a train of cars has been permitted to express an opinion as to the possibility of avoiding an injury to animals, struck by the locomotive, the opinion being given in view of the distance between the animals and the train, when the former came upon the track.<sup>3</sup> One who testified that he had charge of a stationary steam engine, and who did not claim to be a practical engineer, or a first-class locomotive engineer, but who had fired and handled a locomotive, and understood an engine, has been held competent to testify as an expert, as to the effect of a leaky throttle valve upon the handling and

<sup>1</sup> Bellefontaine, etc. R. R. Co. v. Bailey, 11 Ohio St. 333, 335; Macon, etc. R. R. Co. v. Johnson, 38 Ga. 409, 435; Illinois Central R. R. Co. v. Reedy, 17 Ill. 580.

<sup>2</sup> Cooper v. Central Railroad of Iowa, 44 Iowa, 140.

<sup>3</sup> Bellefontain, etc. R. R. Co. v. Bailey, 11 Ohio St. 333.

operation of a locomotive.<sup>1</sup> A locomotive engineer who has observed the nature, operation and effect of sparks issuing from coal burning engines, has been held competent to testify as to the size and effect of sparks issuing from such engines, as to the time during which they would remain alive, and as to the distance at which fire could and could not be communicated by them.<sup>2</sup> And in the same case it was decided that conductors, master-mechanics in railroad shops, brakemen and yard-masters, might give testimony on the same subject. A person practiced in building locomotives and in running them on trial trips, has been held competent as an expert to testify as to the distance within which a train of cars might be stopped by a steam break.<sup>3</sup> When the question was whether an engineer in charge at the time of an injury could or could not have stopped his engine in time to have prevented the injury, another engineer has been allowed to give his testimony on the subject, and by way of illustrating what could be done as to stopping an engine, has been allowed to state what he knew could be done by his having done it.<sup>4</sup> The opinions of a locomotive engineer are admissible on the question whether the boiler of an engine was safe.<sup>5</sup> The opinion of an engineer has been held admissible as to the distance in which he could stop a train going down hill.<sup>6</sup> It has been held that railroad engineers or constructors are not the only persons competent

<sup>1</sup> *Brabbitts v. Chicago, etc. R. R. Co.*, 38 Wis. 289.

<sup>2</sup> *Davidson v. St. Paul, etc. R. R. Co.*, 34 Minn. 51.

<sup>3</sup> *Eckert v. St. Louis, etc. R. R. Co.*, 13 Mo. App. 352.

<sup>4</sup> *Augusta, etc. R. R. Co. v. Dorsey*, 68 Ga. 228, 235.

<sup>5</sup> *Chicago, etc. R. R. Co. v. Shannon*, 43 Ill. 339.

<sup>6</sup> *Maher v. Atlantic, etc. R. R. Co.*, 64 Mo. 267.



to give an opinion as to how the running off of cars on the inside of a curve, instead of the outside, could be accounted for; but that *prima facie* the question could be answered by any person acquainted with the elementary principles of mechanism, and experts only in that branch of science.<sup>1</sup> And in an action against a railway company for the negligent killing of a person on the track, it appearing that at the time of the accident strangers were in the cab of the engine with the engineer, the latter has been permitted to testify that their presence did not interfere with the performance of his duties, it being thought that the jury could not judge of this fact as well as the witness.<sup>2</sup>

*Conductors.* — A railroad conductor has been allowed to testify concerning the duties of an engineer as to looking forward, the court saying: "Certainly one who is in authority over an engineer whose duty is to obey, would be competent to testify as to what those duties were."<sup>3</sup> And when the question was whether at the time of an accident the brakemen were in their proper places, it was held that the opinion of one who had been brakeman, engineer and conductor was admissible.<sup>4</sup> And the opinion of a railroad conductor has been held admissible on the question whether certain railroad ties were fit for use.<sup>5</sup> Railroad conductors are competent to testify as to the means of stopping a train of cars.<sup>6</sup> But it

<sup>1</sup> *Murphy v. N. Y., etc. R. R. Co.*, 66 Barb. 125.

<sup>2</sup> *Marcott v. Marquette, etc. R. R. Co.* 49 Mich. 99.

<sup>3</sup> *Augusta, etc. R. R. Co. v. Dorsey*, 68 Ga. 228, 235.

<sup>4</sup> *Cincinnati, etc. R. R. Co. v. Smith*, 22 Ohio St. 246.

<sup>5</sup> *Grand Rapids, etc. R. R. Co. v. Huntley*, 38 Mich. 537.

<sup>6</sup> *Mobile, etc. R. R. Co v. Blakely*, 59 Ala. 471.

has been held that a conductor was not qualified to express an opinion as to whether a car would have turned over at the time the accident occurred if such chains, as were subsequently placed on the car, had, at the time of the accident, connected the truck with the body of the car. A conductor was said to have no peculiar knowledge on that subject.<sup>1</sup> And a conductor has not been allowed to express the opinion that if the brakeman had held on to his brake and exercised ordinary care he would not have been thrown from his car.<sup>2</sup> His opinion was not inadmissible as coming from a conductor, but because the question involved was not one of science or skill. One who had been a brakeman before he became a conductor has been allowed to testify that the train ought to have been stopped quicker than it was, and in from three to five minutes.<sup>3</sup>

*Other Persons.* — A brakeman is competent to testify as to the effect produced upon a train of cars by the sudden turning on of steam after the speed of the train has been checked by the brakes.<sup>4</sup> And one who has been a brakeman for several years has been held competent to state his opinion as to the rate of speed a train was running at the time of an accident.<sup>5</sup> The competency of witnesses to testify as to the speed of trains is subsequently more fully considered. A locomotive fireman of four years' experience has been allowed as an expert to state his opinion as to

<sup>1</sup> *Bixby v. Montpelier, etc. R. R. Co.*, 49 Vt. 123.

<sup>2</sup> *Gavisk v. Pacific R. R. Co.*, 49 Mo. 274.

<sup>3</sup> *Freeman v. Travelers' Insurance Co.*, 144 Mass. 572.

<sup>4</sup> *Whitsett v. Chicago, etc. R. R. Co.*, 67 Iowa, 150.

<sup>5</sup> *Louisville, etc. R. R. Co. v. Shires*, 108 Ill. 617.

the time or distance within which a given train, under a given set of circumstances, could be stopped.<sup>1</sup>

The road-master of a railroad, whose duty it was to receive and inspect ties, has been allowed to testify as to the quality of certain railroad ties.<sup>2</sup>

One who had been traveling as a mail agent regularly for two years on the cars has been allowed to answer the question, "at what rate of speed should the train have been running to stop at the usual stopping place?"<sup>3</sup> The court in the case above cited said, "to constitute an expert, it cannot be necessary that one should be connected with the management of the train. If he is in position to witness the result of the management, and to observe the effect when the means of checking the train are applied, he may be as competent to express a satisfactory opinion as the conductor, the brakeman, or, possibly, even the engineer."

One who had been the president of two or three city railroads, and had been engaged for some years in building such roads, has been allowed to give his opinion as to whether a street rail had been properly laid.<sup>4</sup>

The opinion of a railroad superintendent, upon a matter within the scope of his employment, "stands upon the footing of an opinion of an expert."<sup>5</sup>

A witness who testified that he was in the business of railroad supplies, and that he was somewhat familiar with railroad brakes, and with the oper-

<sup>1</sup> Grinnall v. Chicago, etc. R. R. Co., 73 Iowa, 93.

<sup>2</sup> Jeffersonville R. R. Co. v. Lanham, 27 Ind. 171.

<sup>3</sup> Detroit, etc. R. R. Co. v. Van Steinburg, 17 Mich. 99.

<sup>4</sup> Carpenter v. Central Park, etc. R. R. Co., 11 Abb. Pr. (N. S.) 416.

<sup>5</sup> Mason, etc. R. R. Co. v. Johnson, 38 Ga. 409.



ations of them, and had used them on a railroad, has been allowed to state within what distance such a train as that in question could be stopped with ordinary brakes, on an ascending grade, running at such a rate that a man could run faster than the train was going.<sup>1</sup>

A machinist connected many years with railroads has been held competent to express an opinion as to what threw a train of cars from the track.<sup>2</sup>

A witness who had been employed in railroad work for twenty-five years, and part of the time had been in charge of a turn-table, has been held competent to answer the question: "Would it be practicable to lock or fence turn-tables?"<sup>3</sup> In a case in South Carolina a witness, who was personally acquainted with the character and location of a turn-table, was allowed to give his opinion as to the danger of it.<sup>4</sup> And in an action for injuries caused by a turn-table used on a street railway, a witness shown to be an expert was allowed to testify as to the kind of turn-tables in general use, as to whether the one in question was of the most approved kind in use, and as to its defects and how they might be remedied.<sup>5</sup>

In the case last cited a carpenter and joiner who had been connected with a street railway for four years, and had made turn-tables for it, was held competent to testify whether a certain turn-table was safe.

A station agent who received and shipped all goods at his station has been allowed to give his opinion

<sup>1</sup> *Mott v. Hudson, etc. R. R. Co.*, 8 Bos. (N. Y.) 345.

<sup>2</sup> *Seaver v. Boston, etc. R. R. Co.*, 14 Gray (Mass.), 466.

<sup>3</sup> *Kolsti v. Minneapolis, etc. R. R. Co.*, 32 Minn. 133.

<sup>4</sup> *Bridger v. Railroad Company*, 25 S. C. 24.

<sup>5</sup> *Fitts v. C. C. R. R. Co.*, 59 Wis. 323.

as to whether it would have interfered with the transaction of the shipping business at that point to have maintained a fence along the railroad tracks.<sup>1</sup>

It appearing that a car load of stock in transit was suffering greatly, probably from heat, it was held not objectionable to ask an expert what course the carrier might properly pursue for their relief.<sup>2</sup>

When the question was as to the competency of an express messenger and baggage-man, it was held that persons shown to have had long experience as express messengers and baggage-men could not express their opinion as to the party's incompetency to perform the duties of such a position. The question was not regarded as being one of science or skill.<sup>3</sup>

When a train was running backward at the time of an accident and there was evidence that the track was in the same condition at that time as when seen by the expert, the latter was allowed to state whether, if the track was in the same condition, it would be more dangerous to run the train backward than forward.<sup>4</sup>

Where the question was whether a rail was defective, or whether it had been maliciously cut, a newspaper editor, who had visited the scene of the accident for the purpose of reporting it, and had testified that during a period of twenty years he had visited "dozens of railroad accidents," and had examined them for the purpose of reporting the probable cause of the accident, was asked to state

<sup>1</sup> Robinson v. St. L., etc. R. R. Co., 21 Mo. App. 141.

<sup>2</sup> Lindsley v. Chicago, etc. R. R. Co., 36 Minn. 540.

<sup>3</sup> Moore v. Chicago, etc. R. R. Co., 65 Iowa, 505.

<sup>4</sup> Kuhns v. Wisconsin, etc. R. R. Co., 70 Iowa, 561.

whether he had arrived at any conclusion as to the cause of the accident. The court held that it was no error to exclude his opinion.<sup>1</sup>

So it has been held that a witness of long railroad experience cannot be allowed to testify whether the blowing of a steam-whistle was, under the circumstances of the case, prudent.<sup>2</sup> It has been held no error to refuse the testimony of switchmen to show that in their opinion it was not necessary for another switchman to have been where he was when he received the injury complained of. The opinions of the witnesses, though experts, were inadmissible, as the subject-matter of inquiry did not partake of the nature of a science so as to require a course of previous habit or study to an attainment of a knowledge of it.<sup>3</sup>

*Speed of Trains*.—From what has been already said it appears that the opinions of experienced railroad men are received when the question is as to the space within which a train may be stopped. The question is a proper one for expert testimony. In a case in the St. Louis Court of Appeals, recently decided, the court in discussing this matter say: "All men who live on or near the line of a railroad may have a general knowledge on the subject, but a correct and reliable judgment can only be attained by some practical experience. Just within what distance a train might be stopped in a given case, with safety to property, and the lives of persons thereon, would depend upon the speed of the train at the time, the grade of the track, the size of the train, whether the

<sup>1</sup> Hoyt v. Long Island R. R. Co., 57 N. Y. 678.

<sup>2</sup> Hill v. Portland, etc. R. R. Co., 55 Me. 438. And see p. 16.

<sup>3</sup> Pennsylvania Co. v. Conlan, 101 Ill. 93. And see p. 14.



cars were loaded or empty, and the kind of brakes used. It is unreasonable to suppose that the judgment of a witness on such a subject, who had no practical knowledge or experience in the running of trains, or had never given the subject special study and investigation, would be worth any more than the judgment of the jurors themselves." It was accordingly held error to allow a witness to express an opinion on such a subject, who testified that he had never run an engine, knew nothing about the construction of trains and had never worked on a railroad, but who had frequently been about the railroad, had often seen trains running at the rate of speed that the train in question was running, flagged and stopped. And in the same case it was also held error to allow a witness to express an opinion on the question who had never run an engine, but had worked as a section hand on a railroad for two years, had frequently seen trains flagged, and had himself flagged them half a dozen times.<sup>1</sup> This matter is elsewhere alluded to, and attention called to the language of the Supreme Court of Michigan on the question of the competency of witnesses to give opinion evidence on this subject.

Questions as to the speed with which trains were moving are not, strictly speaking, scientific inquiries, but any man possessing a knowledge of time and distances is usually competent to express an opinion upon the subject.<sup>2</sup> Witnesses living near a railroad and habitually observing the passage of trains, have

<sup>1</sup> *Gourley v. St. Louis, etc. R. R. Co., Mo. App.* 87, 94 (1889).

<sup>2</sup> *Detroit, etc. R. R. Co. v. Van Steinburg*, 17 Mich. 99; *Guggenheim v. Lake Shore, etc. R. R. Co.*, 66 Mich. 150.

therefore been allowed to express an opinion as to the velocity with which a train was moving.<sup>1</sup> The Supreme Court of Michigan, while adhering to the doctrine that the speed of trains is not properly a scientific question, has said in regard to opinions of persons riding in the cars, and not observing from the outside: "We are not prepared to say they may not be received, but we think they should be excluded, unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumable that ordinary railway travelers usually form such habits."<sup>2</sup> And in a case in the Supreme Court of Wisconsin, the court holds that a non-expert witness may testify as to his estimate of the rate of speed at which a railroad train was moving, but declares that such an estimate is very unsatisfactory proof, and should be received with great caution.<sup>3</sup>

A railroad contractor has been allowed to testify that he thought a certain culvert was sufficiently large for the size of the stream.<sup>4</sup>

§ 105. **Testimony of Insurance Men.**—The opinions of men who are skilled in matters of insurance are received in evidence on questions of insurance which lie beyond the ordinary and common knowledge of mankind. For instance, the opinions of such witnesses have been received: 1. *As to the materiality of concealed facts.* It must be said that

<sup>1</sup> Nutter v. Boston, etc. R. R. Co., 60 N. H. 483.

<sup>2</sup> Grand Rapids, etc. R. R. Co. v. Huntley, 38 Mich. 537. And see Guggenheim v. Lake Shore, etc. R. R. Co., 66 Mich. 150.

Hoppe v. Chicago, etc. R. Co., 61 Wis. 357.

<sup>4</sup> Emery v. Raleigh, etc. R. R. Co., 102 N. C. 217.

there has been a decided conflict of authority, both in this country and in England, on the right of underwriters, and others skilled in the business of insurance, to testify as to the materiality of concealed facts in applications for insurance. So marked has been the conflict of authority on this question in England, that one of the most eminent of the English writers on the law of evidence declares that no satisfactory answer can be given to it.<sup>1</sup> We believe, however, that the better rule is to consider the admissibility of such evidence as dependent on the nature of the facts concealed. It is evident that those facts may be of such a nature that ordinary jurymen would be perfectly competent to decide the question of their materiality, in which case there would seem to be no justification for the admission of expert testimony. On the other hand, the facts may be so special and technical in their nature, especially in questions of marine insurance, that persons without previous experience in the business of insurance would be unable, from the very nature of the case, to arrive at any intelligent conclusion, in which case it seems that there would exist a necessity for the admission of expert testimony.<sup>2</sup>

As Mr. Justice RANNEY expressed it in a case decided in Ohio as long ago as 1853: "If the answer can be given from ordinary experience and knowledge, the jury must respond to it unaided; if the effects of such a cause are only known to persons of skill, and are to be determined only by the application of some principle of science or art, such per-

<sup>1</sup> 2 Taylor's Ev., 1420.

<sup>2</sup> Sec. 5 Am. Law Review, 237; 1 Arnold's Ins. 573; 2 Duer's Ins. 780, n.; 1 Smith's L. C. 490, n.; Hill v. Lafayette Ins. Co., 2 Mich. 476.



sons may give the results of their own investigation and experience to the jury in the way of opinions, the better to enable them to come to a correct conclusion.'"<sup>1</sup>

We think the weight of authority in this country is in favor of the reception of such evidence in those cases in which the facts are so technical and special as not to lie within the common observation of men in general.<sup>2</sup> And when the testimony of underwriters is received as to the materiality of facts, the question is not as to the effect which such facts, if disclosed, would have had on the particular witness, but on underwriters generally. "I do not allow you to ask the witness what he himself, as an underwriter, would have done; but whether, from his knowledge of the business, he is able to state that the facts in question would or would not have an influence with underwriters generally in determining

<sup>1</sup> *Hartford Protection Co. v. Harmer*, 2 Ohio St. 452, 457.

<sup>2</sup> *Seaman v. Fonerau*, 2 Strange, 1183; *Chaurand v. Angerstein*, Peake N. P. C. 61; *Haywood v. Rodgers*, 4 East, 590; *Littledale v. Dixon*, 1 Bos. & Pul. 151; *Richards v. Murdock*, 10 B. & C. 537; *Elton v. Larkins*, 5 C. & P. 385; *Berthon v. Loughman*, 2 Starkie, 258; *Quinn v. National, etc. Ins. Co.*, 1 Jones & Carey (Ir.) 316; s. c., 1 Benn. Fire Ins. Cas. 689; *Hawes v. N. E. Ins. Co.*, 2 Curtis C. C. 229; *Moses v. Delaware Ins. Co.*, 1 Wash. C. C. 385; *Marshall v. Union Ins. Co.*, 2 Wash. C. C. 357; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Kern v. South St. Louis Mutual Ins. Co.*, 40 Mo. 19; *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295; *Hobby v. Dana*, 17 Barb. (N. Y.) 111; s. c., 3 Benn. Fire Ins. Cas. 581; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 187; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Mitchell v. Home Ins. Co.*, 32 Iowa, 424; *Stennett v. Pa. Fire Ins. Co.*, 68 Iowa, 674, 676. But see *Carter v. Boehm*, 2 Burr. 1905; *Durrell v. Bederly*, Holt, N. P. Cases, 283; *Campbell v. Richards*, 5 Barn. & Ad. 840; *Milwaukee, etc. R. R. Co. v. Kellogg*, 94 U. S. 469; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; s. c., 3 Benn. Fire Ins. Cas. 325; *Summers v. U. S. Ins. Co.*, 13 La. Ann. 504; s. c., 1 Bigelow Ins. Cas. 131.

the amount of the premiums. If his knowledge and skill in this particular business does enable him to state this, I think it is legal evidence. \* \* \* Here the inquiry is, in substance, whether the market value price of insurance is affected by particular facts. If the witness, being conversant with the business, has gained in the course of his employment a knowledge of the practical effect of these facts, or similar facts, upon premiums, he may inform the jury what it is."<sup>1</sup>

When the question is as to the materiality of concealed facts other witnesses than those experienced in insurance may be competent. For instance, in the case of life insurance, if the fact concealed were some bodily infirmity, it would certainly be competent to receive the testimony of medical experts on the question whether such infirmity was calculated to shorten the life of the insured. Or in the case of marine insurance it would be proper to receive the testimony of experienced mariners or ship carpenters on the question whether the defect was such as to endanger the safety of the ship.<sup>2</sup> It has been held in the Supreme Court of the United States, that experts in fire insurance, accustomed to estimating and calculating the hazard and exposures to fire from one building to another, could not testify that, owing to the distance between an elevator and a mill, and the distance between an elevator and some lumber piles, the elevator would not be considered as an exposure to the mill, and would not be consid-

<sup>1</sup> Hawes v. N. E. Ins. Co., 2 Curtis C. C. 229. And see Berthon v. Loughman, 2 Starkie, 258, per Holroyd, J.; Hartman v. Keystone Ins. Co., 21 Pa. St. 466.

<sup>2</sup> Hartford Protection Co. v. Harmer, 2 Ohio St. 452, 457; Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 100.

ered in fixing a rate thereon, or in measuring the hazard of the mill or lumber.<sup>1</sup>

2. *As to Increase of Risk.*—The opinions of experts have, in some cases, been received on the question whether certain facts amounted to an increase of risk.<sup>2</sup> But such opinions have likewise been held inadmissible.<sup>3</sup> In Pennsylvania, an insurance company's clerk has been allowed to testify that a risk would not be taken at any premium, on the life of one known to be engaged in a certain occupation.<sup>4</sup> In the case last cited, Mr Chief Justice BLACK said: "But though the cases conflict seriously, I think none of them go so far as to say that one who knows the practice, not only of the particular office, but of insurance offices generally, may not give his opinion of the influence which a given fact would have had as an element in the contract. Certainly this is the opinion supported by the strongest authority and the best reasons." But in New York it has been held improper to prove by experts, that a person who was in the habitual use of intoxicating liquors, would not be considered an insurable subject.<sup>5</sup>

<sup>1</sup> Milwaukee, etc. R. R. Co. v. Kellogg, 94 U. S. 469. And see State v. Watson, 65 Me. 74.

<sup>2</sup> Daniels v. Hudson River Ins. Co., 12 Cush. 416; Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; Schenck v. Mercer Co. Ins. Co., 24 N. J. Law. 451; Mitchell v. Home Ins. Co., 32 Iowa, 424; Cornish v. Farm Buildings Ins. Co., 74 N. Y. 295; Kern v. South St. Louis Mut. Ins. Co. 40 Mo. 19; Appleby v. Astor Fire Ins. Co., 54 N. Y. 253; Brink v. Merchants', etc. Ins. Co. 49 Vt. 442.

<sup>3</sup> Joyce v. Maine Ins. Co., 45 Me. 169; Kirkby v. Phoenix Ins. Co., 9 Lea, 142; Mulny v. Mohawk Valley Ins. Co., 5 Gray (Mass.), 545; Cannel v. Phoenix Ins. Co., 59 Me. 582; State v. Watson, 16 Me. 74, 77; Thayer v. Providence Ins. Co., 70 Me. 539; Liverpool, etc. Ins. Co. v. McGuire, 52 Miss. 227; Franklin Fire Ins. Co. v. Gruver, 100 Pa. St. 266; Merchants' Ins. Co. v. Dwyer, 1 Posey (Tex.), 441; Schwarzbach v. Ohio Valley Protection Union, 25 W. Va. 622.

<sup>4</sup> Hartman v. Keystone Ins. Co., 21 Pa. St. 466.

<sup>5</sup> Rawls v. Am. Mut. Life Ins. Co., 27 N. Y. 282.



3. *As to Increase of Premium.*—Experts have been allowed to testify whether certain facts, if they had been known, would have increased the premium.<sup>1</sup> In giving such evidence they are really giving testimony as to facts rather than drawing inferences from facts. The witness states, from his knowledge of the business of insurance, how certain facts would influence underwriters generally in fixing the amount of the premium.

In a case in which the issue was whether a misdescription of the premises caused the insurance to be effected at a lower premium than would otherwise have been charged, the company's agent, through whom the policy was issued, has been allowed to give his opinion as to the rate at which he could have procured insurance of the premises, as they were, from other companies, and his knowledge as to the rate actually charged by other companies for the insurance of buildings of similar character.<sup>2</sup>

But the mere fact that one is an insurance agent does not necessarily show that he is qualified to testify as an expert concerning the nature of a risk. To be qualified to give testimony on that point the witness must have become experienced in passing on risks, or must have acquired special knowledge on the subject. A person may be an insurance agent without having that knowledge—as in the case of a mere soliciting agent.<sup>3</sup>

<sup>1</sup> *Hawes v. New Eng. Mut. Ins. Co.*, 2 Curt. C. C. 229; *Hobby v. Dana*, 17 Barb. (N. Y.) 111; *Moses v. Delaware Ins. Co.*, 1 Wash. C. C. 386; *Merriam v. Middlesex Ins. Co.*, 21 Pick. 162; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 244.

<sup>2</sup> *Martin v. Franklin Fire Ins. Co.*, 42 N. J. Law, 46.

<sup>3</sup> *Stennett v. Ben. Fire Ins. Co.*, 68 Iowa. 674; *Schmitt v. Peoria Ins. Co.*, 41 Ill. 296; s. c., 5 Ben. Fire Ins. Cases, 90.

Where an action was brought for breach of contract, an insurance company having agreed to make the plaintiff its agent and allow him to remain such for a reasonable time, insurance agents were allowed to state what would be considered a reasonable time. In answer to the objection that the question of reasonable time was one of law for the court, the court said: "But the questions had reference to the business of insurance; these witnesses were insurance agents, experts in that business; neither court nor jury could understand what was a reasonable time in such a case, except upon proof made by competent persons."<sup>1</sup>

Where an action was brought on a policy of insurance against loss by fire on certain goods, it was held competent, on the question as to the value of the goods after the fire, to ask an expert whether there was any better mode of disposing of such goods than the one adopted by the plaintiff.<sup>2</sup>

§ 106. **Testimony of Civil Engineers.**—Civil engineers are frequently called on to give expert testimony. The opinion of civil engineers, experienced in the construction of bridges, has been received as to the strength of construction and safety of a bridge.<sup>3</sup> A civil engineer, experienced in judging of the soundness of timbers in bridges, has been allowed to express an opinion as to whether one of the sleepers in a bridge had rotted recently, or whether the decay was of some length of time.<sup>4</sup> A civil engineer and surveyor, who had made a survey and map of the land in question has been al-

<sup>1</sup> *Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590.

<sup>2</sup> *Clement v. British Am. Assur. Co.*, 141 Mass. 298.

<sup>3</sup> *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56, 60.

<sup>4</sup> *City of Indianapolis v. Scott*, 72 Ind. 196, 203.

lowed to testify how much ground would be overflowed at a given height of water.<sup>1</sup> Such witnesses have also been permitted to state the rules for the construction of cuts and embankments.<sup>2</sup> While in a controversy as to what constituted an approach to a railroad bridge, where the land adjoining the river bank was low and often overflowed, and the track was, in consequence, elevated and rip-rapped, and as to whether such rip-raps and dikes constituted such an approach, the opinions of experienced engineers have been held admissible.<sup>3</sup> So engineers have been permitted to testify, judging from the situation of the banks, the course of the winds and tides, and the shifting of the sand, that a certain bank was not the occasion of a harbor's choking and filling up by stopping the back water.<sup>4</sup> And engineers who had taken the comparative levels of a fountain of water, and of certain agricultural drains in the same lot, and who had examined the intervening subsoil, have been allowed to express an opinion that the drains did not lessen the quantity of water in the fountain.<sup>5</sup> An engineer and landscape gardener has been permitted to express an opinion as to what certain land was suitable for.<sup>6</sup> The opinion of an expert has been held admissible as to the liability of a city to inundation, as well as to the injury to a harbor by the removal of the sand along

<sup>1</sup> *Phillips v. Terry*, 3 Abb. N. Y. Decis. 607.

<sup>2</sup> *Central R. R. Co. v. Mitchell*, 63 Ga. 173; s. c., 1 Am. & Eng. R. R. Cases, 145.

<sup>3</sup> *Union Pacific R. R. Co. v. Clopper*, 2 Am. & Eng. R. R. Cases, 649.

<sup>4</sup> *Folkes v. Chadd*, 3 Douglas (26 Eng. C. L. 63), 157. See also *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396.

<sup>5</sup> *Buffum v. Harris*, 5 R. I. 250.

<sup>6</sup> *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544, 551.



the shore.<sup>1</sup> But a civil engineer is not necessarily an expert as to the construction of a highway.<sup>2</sup> A civil engineer who had experience in the construction of water-ways, has been allowed to testify as to the effect the erection of a mill-dam would have upon the channel of a stream above the dam.<sup>3</sup>

An engineer who had experience in making plans and estimates for the building of bridges and had superintended their construction, has been allowed to testify as an expert with regard to the probable cost of a bridge, notwithstanding the fact that he was without practical experience as a bridge builder.<sup>4</sup> And an engineer who had experience in the erection of bridges, has been allowed to state that it was not customary to have gates of any kind on draw-bridges, but he was not allowed to say whether it was safe and proper to have draws with drop gates across the foot-path of a bridge when the draw was open, that being matter of opinion and not within the range of expert testimony.<sup>5</sup> An engineer of skill and experience, who had studied the river and tested its flow at the points of alleged obstruction and injury, when the action was for damages for the scouring of the water on the plaintiff's lands, has been permitted to answer the question: "Are there any adequate causes, in your judgment, for this (scouring)?"<sup>6</sup>

§ 107. **Testimony of Surveyors.**—Cases in which surveyors have been called on to give testimony

<sup>1</sup> *Clason v. City of Milwaukee*, 30 Wis. 316.

<sup>2</sup> *Benedict v. City of Fond du Lac*, 44 Wis. 495.

<sup>3</sup> *Ball v. Hardesty*, 38 Kan. 540.

<sup>4</sup> *Bryan v. Town of Branford*, 50 Conn. 246.

<sup>5</sup> *Hart v. H. R. Bridge Co.*, 84 N. Y. 56. See pp. 15, 16.

<sup>6</sup> *Moyer v. N. Y. Central, etc. R. R. Co.*, 98 N. Y. 645.

have frequently been before the courts. Surveyors may give in evidence their opinion as to the location of a particular survey.<sup>1</sup> A surveyor, who is familiar with the peculiar marks used by the government surveyors in their public surveys may give his opinion as an expert whether a particular line was marked by them.<sup>2</sup> The opinion of a practical surveyor has been received as to whether certain piles of stones and marks on trees were monuments of boundary.<sup>3</sup> And in a contest as to the true location of lines between adjacent lot owners, a practical surveyor, who has made an actual survey and plat of the lots, has been allowed to testify as to the correctness of the plat, and to state the result of his survey as to the location of the lines, and of the buildings and fences on the lots with reference to such lines.<sup>4</sup> Upon a question as to the boundary line between two counties, which had never been officially located,<sup>5</sup> it has been held that while the opinion of a surveyor was competent evidence to show that certain marks on a tree, claimed as a corner, were corner or line marks, yet it could not be received for the purpose of showing that the tree was the corner of a particular grant.<sup>6</sup> While in an early case it was held that the opinion of a surveyor was admissible as to a mistake in a survey,<sup>7</sup> and where he would locate a warrant similar to that under which a person held,<sup>8</sup> yet the rule is that the opinion of a

<sup>1</sup> *Jackson v. Lambert*, 121 Pa. St. 182.

<sup>2</sup> *Brantly v. Swift*, 24 Ala. 390.

<sup>3</sup> *Davis v. Mason*, 4 Pick. 156; *Knox v. Clark*, 123 Mass. 216.

<sup>4</sup> *Messer v. Reginnitter*, 32 Iowa, 312.

<sup>5</sup> *Kinley v. Crane*, 34 Pa. St. 146.

<sup>6</sup> *Clegg v. Fields*, 7 Jones (N. C.) Law, 37.

<sup>7</sup> *Forbes v. Caruthers*, 3 Yeates, 527.

<sup>8</sup> *Farr v. Swan*, 2 Pa. St. 245.

surveyor is not evidence as to the construction to be given to a survey;<sup>1</sup> that he cannot be permitted to give his opinion as to what are the controlling calls of a deed,<sup>2</sup> the proper location of a grant.<sup>3</sup> The title to property claimed under a recorded plat cannot be unsettled by the testimony of a surveyor who has scaled the plat, that the scale is incorrect.<sup>4</sup> Nor is the opinion of an examiner of titles admissible to fix the location in case of conflicting and doubtful lines.<sup>5</sup> "Experts cannot be called to give their opinions on a subject of this character. Witnesses are competent to show lines and measurements, but the construction of written instruments is for the court alone."<sup>6</sup> It has been held that one who had been occasionally employed as a surveyor in laying out and grading, but not in constructing highways, was not competent to testify as an expert as to the safety of a highway.<sup>7</sup>

A surveyor, who has testified to finding all of the corners pertaining to a given description of land, can be asked "if he found them according to the government survey," that being a matter on which he is authorized to testify as an expert.<sup>8</sup> A surveyor testifying as an expert as to his location of a certain corner has been allowed to state whether or not he was satisfied that such corner was the true quarter section corner,<sup>9</sup> and in testifying as to

<sup>1</sup> *Ormsby v. Ihmsen*, 34 Pa. St. 462.

<sup>2</sup> *Whittlesey v. Kellogg*, 28 Mo. 404.

<sup>3</sup> *Schultz v. Lindell*, 30 Mo. 310; *Blumenthal v. Roll*, 24 Mo. 113; *Randolph v. Adams*, 2 W. Va. 519.

<sup>4</sup> *Twogood v. Hoyt*, 42 Mich. 609.

<sup>5</sup> *Public Schools v. Risley's Heirs*, 40 Mo. 356.

<sup>6</sup> *Norment v. Fastnacht*, 1 McArthur, 515.

<sup>7</sup> *Lincoln v. Inhabitants of Barre*, 5 Cush. (Mass.) 590.

<sup>8</sup> *Hockmoth v. Des Grand Champs*, 71 Mich. 520.

<sup>9</sup> *Toomy v. Kay*, 62 Wis. 104.



the form, configuration, or dimensions of land he may use a map or diagram to aid in making his testimony intelligible, and the map may be submitted to the jury to aid them in understanding or remembering his testimony.<sup>1</sup> As to the right to make use of maps and to submit them to the jury, reference is made to the cases cited below.<sup>2</sup> The cases show that maps of a survey not made in such a manner as to make them admissible as evidence *per se*, may nevertheless be used by the witness to explain and elucidate his testimony.<sup>3</sup> It is well known that the declarations of persons, since deceased, are received in evidence as to the boundaries of lands, where from their situation they had the means of knowing where the boundaries were. In a case in New Hampshire it was sought to extend the principle to the declarations made by a surveyor since deceased. But the court held that the principles on which such evidence was admitted would not comprehend the declarations of a deceased expert. It was not necessary that such declarations should be received, inasmuch as other experts could be called whose testimony would be equally valuable.<sup>4</sup> The opinion that the surveyor had expressed was that a certain tree was not an original monument, because the marks on it were not old enough.

§ 108. **Testimony of Millers and Mill-wrights.**—Millers and mill-wrights are experts in relation to matters of technical skill in their trades.

<sup>1</sup> Humes v. Bernstein, 72 Ala. 546.

<sup>2</sup> Bridges v. McClendon, 56 Ala. 327; Nolin v. Parmer, 21 Ala. 66; Daily v. Fountain, 35 Ala. 26; Burwell v. Sneed, 104 N. C. 118.

<sup>3</sup> Dobson v. Whisenhant, 101 N. C. 645; State v. Whiteacre, 98 N. C. 753; State v. Chee Gong, 17 Oreg. 635.

<sup>4</sup> Wallace v. Goodall, 18 N. H. 439, 453.

Persons who have for years been engaged in building and carrying on mills are qualified to give an opinion touching matters connected with their experience.<sup>1</sup> The opinions of millers and mill-wrights have been received as to the quantity of grain a certain mill was capable of grinding, as to the value of the water for milling purposes, and as to the accuracy of the method of weighing and measuring adopted in the mill.<sup>2</sup> A practical and professional mill-wright, who had taken the levels of the water and the water-wheel, has been permitted to testify that if the mill dam was a foot lower than it was it would be impossible for the mill to grind in a proper manner.<sup>3</sup> Upon an issue as to the fitness of a shoal for a mill site, the opinions of mill-wrights have been received.<sup>4</sup> But it has been held that a witness may testify to the existence of a mill site without being an expert.<sup>5</sup> Where the identity of wheat was material, a miller and grower of wheat who was familiar with the different varieties was permitted to testify that when his wheat was cut early it had a peculiar smell; that the wheat stolen had been cut early; that the grain found in the possession of the defendant had the same odor as that in the hogshead from which the grain had been stolen; and therefore that his opinion was that the wheat alleged to have been stolen was part of the wheat originally in his possession.<sup>6</sup> But where the question related to the freezing up of a mill, the court excluded the opinion

<sup>1</sup> *Hammond v. Woodman*, 41 Me. 177.

<sup>2</sup> *Read v. Barker*, 30 N. J. Law, 378; s. c., 32 *Ib.* 477.

<sup>3</sup> *Detweiler v. Groff*, 10 Pa. St. 376.

<sup>4</sup> *Haas v. Choussard*, 17 Tex. 592.

<sup>5</sup> *Claggett v. Easterday*, 42 Md. 617.

<sup>6</sup> *Walker v. State*, 58 Ala. 393.

of a mill-wright and a tender of mills, who had an experience of fourteen years, that a mill dam on one side of the river being some twenty rods further up the stream than the dam upon the other side, would "make it bad as regards anchor ice," and "that the dams being situated as they are, the anchor ice would naturally fall into the dead or still water." The court thought that it did not appear that his calling gave him means not ordinarily possessed by other persons of forming the opinion expressed.<sup>1</sup> Where the question was as to the skillfulness of work done on a mill, it was held that the opinion of a mill-wright was admissible, but not that of a miller.<sup>2</sup> And in an action for the rent of a mill, under a lease which provided that the lessor should put the mill in good running order, it was held competent to inquire of a mill-wright whether certain additions and repairs were necessary to put the mill in such condition.<sup>3</sup> One who for a number of years had been the owner of mills has been permitted to give his opinion as to the capacity of a person as a mill-wright.<sup>4</sup> A practical miller has been permitted to testify that a certain dam backed the water up so as to affect the operation of a mill situated above the dam in the stream.<sup>5</sup> And it has been held that a person who was not an expert might testify if he knew the fact that backwater made by the defendant diminished the power of the plaintiff's water-wheel.<sup>6</sup>

<sup>1</sup> Woods v. Allen, 18 N. H. 28.

<sup>2</sup> Walker v. Fields, 28 Ga. 237.

<sup>3</sup> Taylor v. The French Lumbering Co., 47 Iowa, 662; Cooke v. England, 27 Md. 14.

<sup>4</sup> Doster v. Brown, 25 Ga. 24.

<sup>5</sup> Ball v. Hardesty, 38 Kan. 540.

<sup>6</sup> Williamson v. Yingling, 80 Ind. 379.



§ 109. **Testimony of Machinists.**—A machinist is an expert in matters of technical skill pertaining to his trade, and may give testimony as such. Practical experience in the observation and use of a machine tend to give a man that peculiar knowledge and special skill which qualify one to testify as an expert. A person who has had such experience has been permitted to testify that a crane or hoisting apparatus was of sufficient capacity and in repair for the use intended.<sup>1</sup> So a machinist has been held competent to give an opinion as an expert, in relation to the construction of machinery.<sup>2</sup> The evidence of such a person has been received to show that a machine was not constructed in a workman-like manner.<sup>3</sup> So where the question involved related to the merits of various machines, as whether one machine was equal in all respects to another machine of different make, persons having superior knowledge and experience with such machines have been permitted to express an opinion—as to whether a certain cotton gin was equal in all respects to the best saw gin then in use.<sup>4</sup> And a witness who had knowledge of the mechanism and working of knitting machines, and who was familiar with the operation of a needle called the latch needle, but who had no experience in the use of the spring needle, and did not know of its operation, has been permitted to show to the jury, the facility and perfection of operation of the latch needle to testify to its merits, and to express an opinion that its use could

<sup>1</sup> Bemis v. Central Vermont R. R. Co., 58 Vt. 636.

<sup>2</sup> Sheldon v. Booth, 50 Iowa, 209.

<sup>3</sup> Curtis v. Gano, 26 N. Y. 426.

<sup>4</sup> Scattergood v. Wood, 79 N. Y. 263.

not be superseded by the spring needle, giving his reasons therefor.<sup>1</sup> It is not necessary in all cases that the witness should be a machinist by trade; if he has had practical experience in operating a particular machine, or machines of a similar character, he is competent to express an opinion as to the kind of work such machine can perform.<sup>2</sup> Where the question was as to the proper mode of testing the strength of leathern fire hose, a manufacturer of steam gauges, who had repeatedly tested hose, was held competent to express an opinion, and to state what constituted "a fair and satisfactory test," such as was provided for by the contract.<sup>3</sup> And where an issue involved the question of how much work a machine could do, a person acquainted with the machine and its construction was allowed to express an opinion.<sup>4</sup> One employed in a railroad machine shop as a master mechanic, has been permitted to express an opinion that a certain spark-arrester was the best known.<sup>5</sup> So machinists and brass finishers of large experience have been allowed to state that, from common observation and without close inspection, it could not be told whether certain brass couplings were perfect or imperfect, and whether they were of any use for the purpose for which they were intended.<sup>6</sup> A person who had been for years a mechanical engineer and a builder of machines, and had seen the machines in question in operation, has been allowed to testify that it was not safe for the

<sup>1</sup> *James v. Hodsden*, 47 Vt. 127.

<sup>2</sup> *Sheldon v. Booth*, 50 Iowa, 209.

<sup>3</sup> *Chicago v. Greer*, 9 Wall. 726, 733.

<sup>4</sup> *Burns v. Welch*, 8 Yerg. (Tenn.) 117.

<sup>5</sup> *Great Western R. R. Co. v. Haworth*, 39 Ill. 349.

<sup>6</sup> *Jupitz v. People*, 34 Ill. 516, 521.

operative to put the hand on the iron plate with the cloth traveling at the rate of a foot a second, the machine being made to shear the nap from the cloth by revolving knives, but he was not permitted to state whether the danger of the operative's hand being drawn under the knives if placed on the cloth would be obvious to an inexperienced operative.<sup>1</sup> The question was within the common knowledge of the jury. A machinist has been allowed to testify as an expert, whether the defective work and condition of a steam saw mill examined by him was due to defective construction, or to want of skill in the management of it.<sup>2</sup>

§ 110. **Testimony of Mechanics.**—A mechanic may testify as an expert in matters of technical skill pertaining to his trade. Thus, witnesses skilled in wood-work have been allowed to testify that a panel had been cut out with a knife, and that the blade of defendant's knife exactly fitted the place where the panel had been pierced—that it had been cut from the outside by one skilled in the use of tools, and was evidently taken out by one who understood the construction of the door.<sup>3</sup> A mechanic has been permitted to testify as to the injury done to a house by defects in the construction of the cellar under it.<sup>4</sup> So where a contract for the construction of a building stipulated that it should have a wood cornice with brackets, but failed to specify whether the cornice should be placed on the wall above the upper joist or below that point, or what width of cornice or length of bracket there should be, it was held com-

<sup>1</sup> *Gilbert v. Guild*, 144 Mass. 601.

<sup>2</sup> *Chandler v. Thompson*, 30 Fed. R. 38.

<sup>3</sup> *State v. Baldwin*, 36 Kan. 2.

<sup>4</sup> *Moulton v. McOwen*, 103 Mass. 587.



petent to admit the testimony of house builders and mechanics as to these matters, and to show by them, that in order to properly place a cornice of a proper width on the building according to contract, it was necessary that the walls should have been built up to the point they were built to, and for which the contractor and builder claimed extra compensation.<sup>1</sup> And in an action for labor and materials in erecting a house, the testimony of master builders who had examined the building and made an estimate of the cost, has been held admissible for the purpose of ascertaining the amount of the damages.<sup>2</sup> Practical mechanics, who showed themselves fully acquainted with the custom as to measuring, have been allowed to testify as to the measurement of masonry,<sup>3</sup> and as to the proper mode of measuring the angles of an octagonal cellar.<sup>4</sup> The opinion of one having a long and thorough acquaintance with the construction of berths on steamboats, has been received as to whether the berths on a certain steamboat were constructed in the manner usual upon the best boats built at the time of its construction.<sup>5</sup> When an application for insurance contained a warranty that the buildings insured were brick, and in an action on the warranty it was contended that the buildings were partly brick and partly wood, it was held that an experienced builder might be asked whether such buildings would be properly denominated "brick" buildings.<sup>6</sup> Builders and contract-

<sup>1</sup> *Haver v. Tenney*, 36 Iowa, 80.

<sup>2</sup> *Tebbetts v. Haskins*, 16 Me. 283.

<sup>3</sup> *Shulte v. Hennessey*, 40 Iowa, 352.

<sup>4</sup> *Ford v. Tirrell*, 9 Gray (Mass.), 401.

<sup>5</sup> *Tinney v. N. J. Steamboat Co.*, 12 Abb. Pr. (N. S.) 1.

<sup>6</sup> *Mead v. Northwestern Ins. Co.*, 3 Selden (N. Y.), 530; s. c., 3 Bennett's Fire Ins. Co. Cas. 483.

ors have been held equally competent with architects, to show that the employment of an architect to make plans and designs for a building, carried with it an employment to superintend its construction.<sup>1</sup>

A cabinet maker of more than eight years' experience, and who performed part of the work in question has been allowed to answer as to whether the work was a good job, and whether it was well done.<sup>2</sup>

§ 111. **Testimony of Masons.**—A mason is an expert in matters of technical skill pertaining to his trade, and is allowed to testify as such. Thus, a practical brick mason, who had aided in the construction of the plaintiff's wall, has been allowed to express an opinion as an expert, as to whether the quantity of rain which fell on the premises within the wall was sufficient to wash it down.<sup>3</sup> So the opinions of masons have been received as to the length of time required to dry the walls of a house so as to make it fit for habitation.<sup>4</sup> But it has been held that the effect of water in disintegrating the mortar of a wall is not a matter of science, and that other persons than masons, who have had an occasion to observe it, are competent to express an opinion concerning it.<sup>5</sup> And experts have been allowed to state how much sand was used with a cask of lime in making certain mortar.<sup>6</sup>

§ 112. **Testimony of Farmers and Gardeners.**—The opinions of farmers and gardeners are received

<sup>1</sup> Wilson v. Bauman, 80 Ill. 493.

<sup>2</sup> Ward v. Kilpatrick, 85 N. Y. 413.

<sup>3</sup> Montgomery v. Gilmer, 33 Ala. 116.

<sup>4</sup> Smith v. Gugerty, 4 Barb. (N. Y.) 619.

<sup>5</sup> Underwood v. Waldron, 33 Mich. 232.

<sup>6</sup> Miller v. Shay, 142 Mass. 598.

in evidence on matters peculiarly within the knowledge of persons following their occupation. Thus, a witness who had used guano on all kinds of garden and field plants and crops, and who had closely and critically watched its effects, has been held competent to testify as to the proper method of using such fertilizers, and as to what would prevent them from acting beneficially.<sup>1</sup> A gardener and a farmer, who had attended to and practiced the draining of lands for the purpose of making them productive, have been held competent to give to their opinion as experts, whether a certain piece of land, examined by and known to them, required draining to put it in condition for cropping.<sup>2</sup> The opinion of a gardener has been received as to the damage done to a garden and nursery by the smoke from a brick kiln.<sup>3</sup> The opinion of a farmer that a wagon loaded with hay in a certain manner was not safe to ride upon over ordinary roads, has been held inadmissible. The jury were competent to determine the question from the facts stated.<sup>4</sup> But the opinions of farmers have been received as to how many bushels of corn there would have been on certain land on which cattle had trespassed, had it not been for such trespass.<sup>5</sup> So it has been held that a farmer could be asked, "taking that hay as it stood then, what would it yield to the acre?" "A person," said the court, "conversant with the growth of grass, and accustomed to compare its appearance in different stages

<sup>1</sup> *Young v. O'Neal*, 57 Ala. 566.

<sup>2</sup> *Buffum v. Harris*, 5 R. I. 250. And see pp. 15, 16.

<sup>3</sup> *Vandine v. Burpee*, 13 Met. (Mass.) 288.

<sup>4</sup> *Bills v. City of Ottawa*, 35 Iowa, 109.

<sup>5</sup> *Sickles v. Gould*, 51 How. Pr. (N. Y.) 25; *Seamans v. Smith*, 46 Barb. (N. Y.) 320; *Keith v. Tiltford*, 12 Neb. 271, 275.



of such growth with its ultimate yield to the acre, may well be said to have such knowledge of that subject as to make him competent to testify how much, in his opinion, a given piece examined by him, will yield per acre. \* \* \* The principle is the same as that on which the opinion of an expert is received. The farmer, acquainted with the subject-matter of such an inquiry as this under consideration is an *expert*, and unless the witness has the peculiar knowledge which constitutes him an expert his opinions would be excluded."<sup>1</sup> Farmers and dairymen have been held competent to express an opinion as to the adulteration of milk.<sup>2</sup> A farmer experienced in clearing up land has been allowed in New York to testify whether a fire was set on land at a proper time.<sup>3</sup> But in Vermont the court has held that the opinions of farmers who saw the fire set, and testified to its position, and to the force and direction of the wind, were inadmissible on the question whether the day on which the fire was set was a suitable and safe day.<sup>4</sup> It has been held in Minnesota that the opinion of a farmer experienced in clearing land was admissible, where the question was as to how many feet in width it would be necessary to plow to stop a fire on stubble land.<sup>5</sup> It has been held in Massachusetts that the opinion of a farmer was inadmissible on the question whether there was a liability that a fire set under certain circumstances would have spread to adjoining land.<sup>6</sup>

<sup>1</sup> Phillips v. Terry, 3 Abb. N. Y. Decis. 607, 609.

<sup>2</sup> Lane v. Wilcox, 55 Barb. (N. Y.) 615.

<sup>3</sup> Ferguson v. Hubbell, 26 Hun (N. Y.), 250. And also see Wells v. Eastman, 61 N. H. 507.

<sup>4</sup> Fraser v. Tupper, 29 Vt. 409.

Kipner v. Blehl, 28 Minn. 139.

<sup>6</sup> Higgins v. Dewey, 107 Mass. 494.

One who had experience as an overseer of a plantation for some five or six years, has been held qualified as an expert to express an opinion that the overseer of another plantation had "managed pretty well."<sup>1</sup> And one who had served as overseer of a plantation for sixteen months, has been held competent to testify as to the amount of food which was sufficient for a plantation slave.<sup>2</sup>

The opinion of a farmer is admissible as to the quality of the soil of a farm,<sup>3</sup> and as to whether a cow was diseased.<sup>4</sup> Farmers, who for a number of years had the care, training and common use of horses, have been allowed without objection to state that from their own knowledge of horses, a horse which had been frightened and had run, and had not run again for a period of more than a year and a half, was not any more likely to run than if he had not run before.<sup>5</sup> While no objection was raised as to the qualifications of the witness in the above case, it was objected that the question was not one of skill, science, or peculiar knowledge, but the court ruled that it was not a matter of common knowledge, and that the testimony was properly received.

A farmer who raises horses for the market has been held competent to testify as to the value of a thoroughbred stallion of which he had knowledge.<sup>6</sup>

§ 113. **Testimony of Cattlemen.**—We have seen in preceding section that the opinions of farmers have

<sup>1</sup> *Spiva v. Stapleton*, 38 Ala. 171.

<sup>2</sup> *Cheek v. State*, 38 Ala. 227.

<sup>3</sup> *Sarle v. Arnold*, 7 R. I. 582.

<sup>4</sup> *Slater v. Wilcox*, 57 Barb. (N. Y.) 604. See chapter VIII.

<sup>5</sup> *Donnelly v. Fitch*, 136 Mass. 558.

<sup>6</sup> *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272.

been received on questions relating to horses and cattle. It remains to consider like cases in which the opinions of cattlemen have been received in evidence. The opinions of men engaged in raising stock, and accustomed to riding through the same range in quest of stock, have been received as to the number of stock of a particular brand running in the range.<sup>1</sup> And in a recent case in Texas it was held that an expert could testify as to the topography of the country, the number of cattle frequenting it, and whether they were wild or gentle, but that he could not testify as to the length of time which would be required to gather a certain number of cattle within the limits of a given range.<sup>2</sup> The opinions of experienced graziers have been received as to the condition of cattle, and as to the causes which affect their health and weight.<sup>3</sup> Persons experienced in weighing cattle are permitted to express an opinion as to the weight of cattle.<sup>4</sup> A stock raiser has been allowed to testify as to the damage done to cattle by falling through a wharf.<sup>5</sup> A shepherd has been permitted to give an opinion as to the age of a sheep, judging from its teeth,<sup>6</sup> and so in respect to the age of a horse, or other animal, experienced persons will be permitted to express an opinion as to his age, from an examination of his mouth and the observation of other signs.<sup>7</sup> A cattle driver has been allowed to answer the question, "How many hands would be necessary to drive two

<sup>1</sup> Albright v. Corley, 40 Tex. 105.

<sup>2</sup> Tyler v. State, 11 Tex. Ct. of App. 388.

<sup>3</sup> Baltimore, etc. R. R. Co. v. Thompson, 10 Md. 76.

<sup>4</sup> McCormie v. Hamilton, 23 Gratt. (Va.) 561; Carpenter v. Wait, 11 Cush. (Mass.) 257; Filley v. Billings, 42 N. W. Rep. 713.

<sup>5</sup> Polk v. Coffin, 9 Cal. 56.

<sup>6</sup> Clague v. Hodgson, 16 Minn. 329.

<sup>7</sup> See Moreland v. Mitchell County, 40 Iowa, 401.



hundred mules, supposing they were broke mules and driven under the circumstances detailed by the witnesses in this case?"<sup>1</sup>

When the question was as to the overloading a car-load of hogs, a witness who had been in the habit of shipping hogs in cars for many years, was allowed to state that hogs of the number and weight of those in controversy could not be safely shipped in one car in hot weather.<sup>2</sup>

§ 114. **Testimony of Painters and Photographers.**—The opinion of an artist in painting is competent evidence as to the genuineness of a painting.<sup>3</sup> An ambrotypist and daguerreotypist has been held competent to express an opinion as to whether photographs were well executed.<sup>4</sup> And an expert in photography has been allowed to testify, from what he knew and saw of a photograph printer's work and capacity, how many photographic pictures such person could paint in the course of a month.<sup>5</sup> In the same case it was announced, that although experts might be alone competent to testify whether a photograph was well executed, yet it required no special skill in a knowledge of the photographic art to determine whether the picture resembled the original, and any person for whom the picture was taken could testify that it was a good likeness.

§ 115. **Testimony of Lumbermen.**—One employed in getting out logs has been permitted to testify as an expert, whether a person with the force of men he had employed could have continued to deliver a

<sup>1</sup> North Missouri R. R. Co. *Akers*, 4 Kan. 453.

<sup>2</sup> Wabash, etc. R. R. Co., v. Pratt, 15 Bradw. (Ill.) 177.

<sup>3</sup> Folkes v. Chadd, 4 Dougl. 157.

<sup>4</sup> Barnes v. Ingalls, 39 Ala. 193.

<sup>5</sup> Barnes v. Ingalls, 39 Ala. 193.

certain amount of logs per day.<sup>1</sup> One who had experience in floating logs in a certain stream has been allowed to express an opinion as to the proper manner of floating logs through a dam and flume. "The running of the logs in that stream, and through that bulk-head, was not a matter of common knowledge, nor of adequate common judgment upon the facts shown by the other evidence. The experience and observation of the plaintiff gave him the grounds and faculty of an opinion peculiar to himself, and not common to men who had no such experience or observation. In a substantial sense he may be regarded as an expert having peculiar knowledge and skill, which renders his opinion worthy of consideration as the ground of judgment and opinion in others who have not such knowledge and skill."<sup>2</sup> The opinion of a lumber dealer has been received as to the quality of certain lumber.<sup>3</sup> And one engaged in lumbering has been permitted to state whether a raft was properly moored.<sup>4</sup> Where the question was whether certain lumber had been negligently piled, it was decided that one experienced in such work could not testify how he would have piled it in a certain case, nor how, in his opinion, it might have been piled. The piling of lumber was not thought, in any proper sense, to involve the exercise of technical knowledge or skill.<sup>5</sup> A person experienced in the sawing of lumber has been permitted to testify that at the time of an accident the

<sup>1</sup> *Salvo v. Duncan*, 49 Wis. 157.

<sup>2</sup> *Dean v. McLean*, 48 Vt. 412.

<sup>3</sup> *Moore v. Lea's Admr.*, 32 Ala. 375. See pp. 15, 16.

<sup>4</sup> *Hayward v. Knapp*, 23 Minn. 430.

<sup>5</sup> *Baldwin v. St. Louis, etc. R. R. Co.*, 68 Iowa, 37.

log being sawed did not pinch the saws, and that the machinery was being operated in the usual manner.<sup>1</sup>

§ 116. **Testimony of Experts in Patent, Trade-Mark and Copyright Cases.**—In actions for the infringement of patent rights, the testimony of experts is admissible for the purpose of explaining the drawings, models and machines exhibited, as well as for the purpose of explaining their operation, and pointing out the resemblance or difference in the mechanical devices involved in their construction.<sup>2</sup> But the court cannot be compelled to receive the evidence of experts as to how a patent ought to be construed, and whether it has been violated.<sup>3</sup> Neither will an expert be allowed to testify that, from investigations made by him in scientific works, he has ascertained that an invention patented long before, was well known prior to the application for letters patent thereon. "The question," said the court, "proposed to the defendant, as an expert, sought to establish an historical fact, under the guise of a scientific opinion. It was properly excluded."<sup>4</sup> In actions for the infringement of trade-marks, the probability of deception is generally shown by resemblance and by the opinions of experts.<sup>5</sup> And in the case of an alleged violation of a copyright, it has been held that experts could testify, and state the results of comparisons made by them of the notes and citations of authorities contained in the two law

<sup>1</sup> *Sanborn v. Madeira Flume and Trading Co.*, 70 Cal. 261.

<sup>2</sup> *Abbott's Trial Ev.* 760; *Corning v. Burden*, 12 How. 252; *Hudson v. Draper*, 5 Fisher Pat. Cas. 256, 259; s. c., 4 Clifford, 181; *Cahoon v. Ring*, 1 Clifford, 592; *Winans v. N. Y. & Erie R. R. Co.*, 21 How. 88.

<sup>3</sup> *Waterbury Brass Co. v. N. Y., etc. Co.*, 3 Fisher Pat. Cas. 43, 54.

<sup>4</sup> *McMahon v. Tyng*, 14 Allen, 167.

<sup>5</sup> *Abbott's Trial Ev.* 752.



books in question, together with their opinions as to whether the several notes and citations were of the same character.<sup>1</sup>

§ 117. **Testimony of Business Men as to Usage.**—

On a question of usage in a particular trade or business, the opinions of persons experienced therein will be received in evidence.<sup>2</sup> “Usage is proved,” says the court in Massachusetts, “by witnesses testifying of its existence and uniformity from their knowledge, obtained by observation of what is practiced by themselves and others in the trade to which it relates. But their conclusions or inferences as to its effect, either upon the contract or the legal title, or rights of parties, are not competent to show the character or force of the usage.”<sup>3</sup> That the opinions of experts, in a particular business as to the existence of a usage in that particular business, are inadmissible when the effect would be to contradict the express terms of the contract, is well settled upon the authorities.<sup>4</sup> Neither can such evidence be received

<sup>1</sup> Lawrence v. Dana, 4 Clifford, 1, 72.

<sup>2</sup> Wilson v. Bauman, 80 Ill. 494; Kershaw v. Wright, 115 Mass. 361; The City of Washington, 92 U. S. 31.

<sup>3</sup> Haskins v. Warren, 115 Mass. 514, 535. And see Barnes v. Ingalls, 39 Ala. 193.

<sup>4</sup> Malcolmson v. Morton, 11 Irish Law R. 230 (Q. B.); Peters v. Stavely, 15 L. T. (N. S.) 151; Reading v. Menham, 1 Moo. & R. 234; Savings Bank v. Ward, 100 U. S. 195, 206; Partridge v. Insurance Co., 15 Wall. 375; Thompson v. Riggs, 5 Wall. 663, 679; Snelling v. Hall, 107 Mass. 134; Brown v. Foster, 113 Mass. 136; Dickinson v. Gay, 7 Allen (Mass.), 29, 31; Randall v. Rotch, 12 Pick. (Mass.) 107; Barlow v. Lambert, 28 Ala. 704; Polhemus v. Heinman, 50 Cal. 438; Bank of Commerce v. Bissell, 72 N. Y. 615; Collender v. Dinsmore, 55 N. Y. 200; Frith v. Barker, 2 Johns. (N. Y.) 334 Corbett v. Underwood, 83 Ill. 324; Wilson v. Bauman, 80 Ill. 493; Dixon v. Dunham, 14 Ill. 324; Stultz v. Locke, 47 Md. 562, 568; Bodfish v. Fox, 23 Me. 90; Exchange Bank v. Coleman, 1 W. Va. 69; Randolph v. Holden, 44 Iowa, 327; Erwin v. Clark, 13 Mich. 10, 18; Bedford v. Flowers, 7 Humph. (Tenn.) 232; Atwater v. Clancy, 107 Mass. 369.

when it would result in violating a positive requirement of law, or some principle of public policy.<sup>1</sup> It is not to be supposed, however, that a custom or usage cannot be shown in any case, if it is simply different in its effect from some general principle of law. To have this effect, it must conflict with some rule of public policy, or be unjust and oppressive in its character.<sup>2</sup>

It is held that a witness is competent to testify as to usage whose only knowledge of it is derived from his own business, if that has been sufficiently extensive and long continued.<sup>3</sup> The testimony of those engaged in a particular business, that they never heard of such a usage, is admissible.<sup>4</sup> On the issue whether an alleged commercial usage exists, a witness may be asked to describe how, under the usages in force, a transaction like the one in question would be conducted by all the parties thereto, from its inception to its conclusion.<sup>5</sup> It has been held in England that a London *stock broker* is a competent witness as to the course of business of London *bankers*.<sup>6</sup> And it is to be observed that a person may be competent to testify as to the usage which prevails in a certain business, without himself being

<sup>1</sup> Barlow v. Lambert, 28 Ala. 704, 710; Antomarchi v. Russell, 63 Ala. 356; Wilson v. Bauman, 80 Ill. 493, 495; Bissell v. Ryan, 23 Ill. 570; Homer v. Dorr, 10 Mass. 26; Reed v. Richardson, 98 Mass. 216; Lockhart v. Dewees, 1 Tex. 535; Jackson v. Beling, 22 Ia. Ann. 377; Barnard v. Kellogg, 10 Wall. 383; Brown v. Jackson, 2 Wash. C. C. 24; Southwestern Freight, etc. Co. v. Standard, 44 Mo. 71; Raisin v. Clark, 41 Md. 158; Minnesota Central R. R. Co. v. Morgan, 52 Barb. (N. Y.) 217, 221; Inglebright v. Hammond, 19 Ohio, 337.

<sup>2</sup> See Lawson on Usages and Customs, Chapter V, §§ 225, 248.

<sup>3</sup> Hamilton v. Nickerson, 13 Allen (Mass.), 351.

<sup>4</sup> Evansville, etc. R. R. Co. v. Young, 28 Ind. 516.

<sup>5</sup> Kirshaw v. Wright, 115 Mass. 361.

<sup>6</sup> Adams v. Peters, 2 Car. & Kir. (61 E. C. L.) 722.

engaged in that business. So that when the question was as to the custom of the New York banks in paying the checks of dealers, it was held proper to call as witnesses persons who were not employed in banks. "Although not employed in banking business, the witnesses were dealers with the banks, and had knowledge of the ordinary course of dealing with them. There is no necessity for showing a man to be an expert in banking in order to prove a usage. He should know what the usage is, and then he is competent to testify whether he be a banker, or employed in a bank, or a dealer with banks. There is no reason why a dealer should not have as much knowledge on such a subject as a person employed in a bank."<sup>1</sup>

§ 118. **Testimony as to Technical Terms and Unusual Words.**—It is laid down as clearly within the province of the court to define technical words to the jury.<sup>2</sup> The courts take judicial notice of the meaning of words and idioms in the vernacular of the language.<sup>3</sup> And where foreign words have been so far Anglicized by common use as to have become substantially a part of our language, it is within the province of the court to define them to the jury.<sup>4</sup> Instances of such words are "*habeas corpus*," "*bona fide*," "*prima facie*," "*a fortiori*," "*flagrante delicto*." The general rule undoubtedly is that the meaning of an English word, not a technical term, cannot be

<sup>1</sup> Griffin v. Rice, 1 Hilton (N. Y.), 184.

<sup>2</sup> Thompson's Charging the Jury, § 18.

<sup>3</sup> Greenl. Evidence, § 5.

<sup>4</sup> Townshend on Slander & Libel, 160, note 2; Homer v. Taunton, 5 H. & N. 661, 667; Barnett v. Allen, 3 H. & N. 376; Hoare v. Silverlock, 12 Ad. & El. (N. S.) 624; Gibson v. Cincinnati Enquirer, 5 Cent. L. J. 380 (U. S. Circuit Ct., Southern District of Ohio).



made known to the jury by an examination of witnesses. It has, therefore, been held error in an action for libel to allow a physician to testify as to the meaning of the word "malpractice."<sup>1</sup> But this rule does not apply "where a known English word or phrase has acquired a local meaning different from its ordinary acceptation, nor where it has acquired a peculiar meaning in a particular science, art or trade, or among a particular sect, and where it seems to have been used in such local or peculiar sense."<sup>2</sup> Hence, it may be laid down that when a new or unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or business, or to any particular class of people, it is proper to receive the testimony of witnesses having special knowledge of such words as to the meaning attached to them.<sup>3</sup> The rule has been well stated by the Supreme Court of Massachusetts in the following language: "The general rule of law is, that the construction of every written instrument is matter of law, and, as a neces-

<sup>1</sup> *Rodgers v. Kline*, 56 Miss. 818. See, too, *Haley v. State*, 63 Ala. 89; *Campbell v. Russell*, 9 Iowa, 337.

<sup>2</sup> *Rodgers v. Kline*, *supra*.

<sup>3</sup> *Eaton v. Smith*, 20 Pick. (Mass.) 156; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 429; *Collender v. Dinsmore*, 55 N. Y. 200; *Sturm v. Williams*, 38 N. Y. Superior Ct. 325; *Hearn v. New England Mutual Ins. Co.*, 3 Clifford C. C. 318; *Prather v. Ross*, 17 Ind. 495; *Silverthorne v. Fowle*, 4 Jones (N. C.) Law, 362; *James v. Bostwick*, *Wright* (Ohio), 142; *Harris v. Rathbun*, 2 Abbott (Ct. of App. Decis.), 328; *Williams v. Poppleton*, 3 Oreg. 139; *Pollen v. Le Roy*, 10 Bos. (N. Y.) 38; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153, 155; *Reynolds v. Jourdan*, 5 Cal. 108; *Reamer v. Nesmith*, 34 Cal. 627; *Callahan v. Stanley*, 57 Cal. 479; *Evans v. Commercial Ins. Co.*, 6 R. I. 47; *Burnham v. Boston Marine Ins. Co.*, 139 Mass. 399; *Beason v. Kurz*, 66 Wis. 448; *Long v. Davidson*, 101 N. C. 175; *Newhall v. Appleton*, 114 N. Y. 140; *Smith v. Clews*, 114 N. Y. 190; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453.

sary consequence, that courts must, in the first instance, judge of the meaning, force and effect of language. The meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are, *prima facie*, matter of law, to be construed and passed upon by the court. But language may be ambiguous, and used in different senses; or general words, in particular trades and branches of business—as among merchants, for instance—may be used in a new, peculiar or technical sense; and, therefore, in a few instances, evidence may be received from those who are conversant with such branches of business, and such technical or peculiar use of language to explain or to illustrate it.”<sup>1</sup> In that case the court held that the testimony of experienced persons could not be received to show that stones of a considerable size were universally known as, and called gravel.

A gas-fitter has been permitted to testify whether *gas-meters* were usually classified as *gas-fixtures*, in an action for the price of gas meters alleged to have been furnished to fulfill a contract for *gas-fixtures*.<sup>2</sup> The opinion of one engaged in the oil business has been received, to show that in a contract for the sale of a certain number of “barrels” of petroleum oil, the word “barrel” meant a vessel of a certain capacity, and not the statute measure of quantity.<sup>3</sup> So the opinion of an expert has been received to show that the meaning of the term “horn chains,” used in a contract, meant chains made of hoof and horn;<sup>4</sup>

<sup>1</sup> *Brown v. Brown*, 10 Met. 573.

<sup>2</sup> *Downs v. Sprague*, 1 Abbott's Ct. of App. Decis. (N. Y.) 550.

<sup>3</sup> *Miller v. Stevens*, 100 Mass. 518.

<sup>4</sup> *Sweet v. Shumway*, 102 Mass. 365.

and the term "port risk," as used by underwriters in policies of marine insurance, had a special signification.<sup>1</sup> Agents for insurance companies have been allowed to testify whether the words "short rates," as used in policies, include all the expenses of taking the risk.<sup>2</sup> Where a contract was for the sale of "one hundred and fifty casks of one ton each, best madder, 12 1-4," dealers in madder were allowed to testify that the figures as used in the contract, meant 12 1-4 cents per pound.<sup>3</sup> The opinions of stock brokers have been received to explain the meaning among brokers and dealers in stock of the words, "settled at the market 72 3-4."<sup>4</sup> And the opinion of iron merchants has been received as to what was meant by "No. 1 Shott's Scotch pig iron."<sup>5</sup> Persons engaged in the construction and operation of mills and factories run by water, and acquainted with the application of water to machinery, have been permitted to testify as to the technical meaning of the term "race-way."<sup>6</sup> And experts may be called to decipher abbreviated and elliptical entries in the book of a deceased notary.<sup>7</sup>

§ 119. **Translation by Experts of Writings from a Foreign Language.**—The rule is that when an instrument is written in a foreign language one skilled in such language is to be called to translate it.<sup>8</sup> But it is not competent for a

<sup>1</sup> *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453.

<sup>2</sup> *Burlington Ins. Co. v. Leod*, 40 Kan. 54.

<sup>3</sup> *Dana v. Fiedler*, 12 N. Y. 40.

<sup>4</sup> *Storey v. Salomon*, 6 Daly (N. Y.), 532.

<sup>5</sup> *Pope v. Filley*, 9 Fed. Rep. 65, 69.

<sup>6</sup> *Wilder v. Decou*, 26 Minn. 10.

<sup>7</sup> *Sheldon v. Benham*, 4 Hill, 129.

<sup>8</sup> *Di Sora v. Phillips*, 10 H. L. Cas. 624; *Stearine v. Hentzman*, 17 C. B. (N. S.) 56; *Sheldon v. Benham*, 4 Hill, 129; *Geylin v. Villeroy*, 2 Houston (Del.), 311.



witness called to translate such a writing to give any opinion as to its construction, that being a question for the court.<sup>1</sup>

If the court, however, should undertake to translate a writing without the aid of experts, and should translate it correctly, it is probable that a new trial could not be obtained. In one of the cases we find the following upon this point: "Indeed, if the whole libel had been published in a foreign language, and the court had assumed to translate and define its meaning to the jury without the aid of experts, it is difficult to see how this error could be made the ground for a new trial. It is only error that prejudices, which justifies setting aside the verdict; and if that translation is in fact correct, it is difficult to see wherein the prejudicial error lies."<sup>2</sup>

§ 120. **Opinions of Experts in Miscellaneous Cases.**—From what has been stated it appears that the opinions of persons skilled in any trade or calling are experts as to matters of technical skill relating to their trade or calling, and their testimony may be received as such in evidence. In the preceding sections of this chapter, attention has been called to the application which has been made of this principle in respect to certain trades, but the principle is equally applicable in all trades and callings when the question at issue is technical and not within the common experience of men in general. Thus, the

<sup>1</sup> A Belgian counsel was called to translate the following: "Les informations sur Gustave Siehel sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissances, et vous ne les lui de livrez que contre payment." He was asked to what the article "les" referred, and said it was applicable to the "connaissances." This was held to be error. *Stearine v. Hentzman*, *supra*.

<sup>2</sup> *Gibson v. Cincinnati Enquirer* (U. S. Cir. Ct.), 5 Cent. L. J. 380.

opinion of an ethnologist has been received upon the question of race,<sup>1</sup> the opinions of persons having a peculiar and special knowledge of iron, upon the question of the quality and strength of iron, the breaking of which caused an accident;<sup>2</sup> the opinion of a paver as to the number of bricks laid in a pavement, ascertained from a computation by the square yard according to usage of the craft, without reckoning them by tale;<sup>3</sup> the opinions of witnesses having knowledge of the geological structure and formation of the neighborhood, as to the existence of coal seams, and of the quality and quantity on the lands in question;<sup>4</sup> the opinion of a blacksmith as to whether the shoes of a horse were fit for use;<sup>5</sup> of persons engaged in the wool trade, as to the liability of wool waste to ignite spontaneously;<sup>6</sup> the opinion of a practical miner as to the safety of a particular blasting powder which he had used.<sup>7</sup> So one employed in manufacturing explosive compounds, and who had made blasts in all kinds of rocks and stones, in every kind of blasting, has been held qualified "as a most competent expert," to state whether portions of a rock could have been thrown 280 feet from the point of discharge, the blast being exploded in the excavation of a sewer.<sup>8</sup> The opinions of experienced per-

<sup>1</sup> *White v. Clemens*, 39 Ga. 232; *Nave's Admr. v. Williams*, 22 Ind. 368; *State v. Jacobs*, 6 Jones (N. C.) Law, 284.

<sup>2</sup> *Claxton's Admr. v. Lexington, etc. R. R. Co.*, 13 Bush (Ky.), 636; *King v. New York Central, etc. R. R. Co.*, 72 N. Y. 607; *Pope v. Filley*, 9 Fed. Rep. 65, 66.

<sup>3</sup> *Mayor, etc. v. O'Neill*, 1 Pa. St. 342.

<sup>4</sup> *Stambaugh v. Smith*, 23 Ohio St. 584, 594.

<sup>5</sup> *Evarts v. Middlebury*, 53 Vt. 626.

<sup>6</sup> *Whitney v. Chicago & N. W. R. R. Co.*, 27 Wis. 327.

<sup>7</sup> *Snowden v. Idaho Quartz Manuf. Co.*, 55 Cal. 450.

<sup>8</sup> *Koster v. Noonan*, 8 Daly (N. Y.), 232.

sons have been received as to whether two pieces of wood were parts of the same stick of natural growth.<sup>1</sup> And it has been held that an expert may be asked what the condition of a water-pipe, as described by another witness, indicated as to the original construction of the joint.<sup>2</sup> A well-digger, who from the exercise of his business in the vicinity has become acquainted with the character of the soil and subsoil, has been allowed to testify to his opinion, whether a given thickness of subsoil, if undisturbed, was impervious to water.<sup>3</sup> A witness who had been engaged for years in measuring and selling water to miners, was held sufficiently qualified to give his opinion as to the effect which a dam across a stream would have in raising the water in the channel above.<sup>4</sup> When the question was as to the cause of the settling and cracking of the surface of the earth, the opinions of experts were received, they having examined the premises, and being qualified by learning, observation and experience to form an intelligent judgment in the matter.<sup>5</sup>

The opinion of an expert has been received as to the quantity of stone furnished for a water-works reservoir, where the average amount could only be estimated approximately.<sup>6</sup> The testimony of experts has been received as to whether it is possible to examine all the layers in a case of old tobacco without injuring the tobacco, and as to what is the proper method of examining such a case for the pur-

<sup>1</sup> *Commonwealth v. Choate*, 105 Mass. 451.

<sup>2</sup> *Hand v. Brookline*, 126 Mass. 324.

<sup>3</sup> *Buffum v. Harris*, 5 R. I. 250.

<sup>4</sup> *Blood v. Light*, 31 Cal. 115.

<sup>5</sup> *Clark v. Willett*, 35 Cal. 534, 544.

<sup>6</sup> *Eyerman v. Sheehan*, 52 Mo. 221.



pose of determining the kind and quality of the tobacco.<sup>1</sup> Experts have been allowed to testify that a certain quality of steel was not considered suitable for the manufacture of steel rails.<sup>2</sup> One who had made and sold railroad ties has been held competent to testify as to the quality of certain ties.<sup>3</sup> And in general skilled witnesses are allowed to testify as to the quality of goods.<sup>4</sup> The testimony of a tailor has been received as to whether a pocket-book could have been taken out through a cut made by a pick-pocket in a coat, it appearing that the coat had been mended subsequently to his examination of it.<sup>5</sup> The genuineness of a postmark may be shown by the testimony of a postmaster,<sup>6</sup> and perhaps by the testimony of any one who has been in the habit of receiving letters with that mark.<sup>7</sup> An expert has been permitted to express an opinion as to the contents of a tree from the size of its stump.<sup>8</sup>

Where books and schedules of the assets and debts of a party are put in evidence, an accountant has been allowed to give the results of computations therefrom.<sup>9</sup> Witnesses who stated that they were accustomed to handling and driving horses, and knew their habits, have been allowed to express an opinion that certain obstructions on a bridge were of such a character as would be likely to frighten

<sup>1</sup> *Atwater v. Clancy*, 107 Mass. 369.

<sup>2</sup> *Booth v. Cleveland Mill Co.*, 74 N. Y. 27.

<sup>3</sup> *Jeffersonville R. R. Co. v. Lanham*, 27 Ind. 171.

<sup>4</sup> *Myers v. Murphy*, 60 Ind. 282; *Brown v. Leach*, 107 Mass. 364.

<sup>5</sup> *People v. Morrigan*, 29 Mich. 5.

<sup>6</sup> *Abbey v. Lill*, 5 Bing. 299, 304.

<sup>7</sup> *Woodcock v. Houldsworth*, 16 M. & W. 124.

<sup>8</sup> *Frantz v. Ireland*, 66 Barb. 386.

<sup>9</sup> *Jordan v. Osgood*, 109 Mass. 457.

horses of ordinary gentleness. "The nature, habits, and peculiarities of horses," said the court, "are not known to all men. Persons who are in the habit of handling and driving horses, from this experience, learn their habits, nature, etc., and are, therefore, better able to state the probable conduct of a horse under a given state of circumstances, in which they have in their experience witnessed their conduct under similar circumstances, than persons having no experience whatever with horses."<sup>1</sup>

The opinions of persons accustomed to witness the agility and power of certain fish, in overcoming obstructions in the ascent of rivers, and who have acquired superior knowledge upon that subject, have been held admissible for the purpose of showing that a certain stream, in its natural state, would or would not be ascendible by such fish. "The witnesses had acquired from observation, superior knowledge upon this subject. It appears to us to fall within that class of cases in which the opinions of persons skilled in any art, science, trade or business are received."<sup>2</sup> A brick and tile maker, having had some years' experience in his trade, has been held competent to give an opinion as an expert on the proper mode of burning tiles, and as to what would be the effect of burning in one way or another.<sup>3</sup> An architect has been permitted to testify that the work done on a building was performed in compliance with the contract.<sup>4</sup> One who had been

<sup>1</sup> *Moreland v. Mitchell County*, 40 Iowa, 401.

<sup>2</sup> *Cottrill v. Myrick*, 12 Me. 222, 231.

<sup>3</sup> *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338.

<sup>4</sup> *Tucker v. Williams*, 2 Hilton (N. Y.) 562.

engaged for over twenty years in the manufacture of paper, has been held competent to testify as to what the condition of a paper mill and its machinery was at a certain time.<sup>1</sup> The opinion of a witness experienced in the use of guns, has been received as to the length of time since the weapon was discharged.<sup>2</sup> And it has been held that witnesses who saw a pistol immediately after it had been discharged, and who were familiar with such weapons, could be asked their opinion on the question, whether the appearances indicated how many barrels had been fired, and which ones.<sup>3</sup> A witness accustomed to packing marbles for transportation, has been permitted, against objection, to state whether certain marbles were properly packed, the court declaring that such a question was a proper one for the testimony of experts.<sup>4</sup> An expert has been allowed to testify as to the usual manner in which zinc is imported.<sup>5</sup> A witness who is an expert in the curing and care of meats, may testify whether hams prepared in a certain prescribed way and shipped for transportation to a specified point, if properly stowed and cared for, "ought to have borne transportation" to that point.<sup>6</sup> Such a witness may also be asked whether hams shipped in a specified condition, would arrive at their destination in as good condition as when shipped, and as to what would likely be the effect of the weather upon provisions so ship-

<sup>1</sup> *Blodgett Paper Co. v. Farmer*, 41 N. H. 401.

<sup>2</sup> *Monghon v. The State*, 57 Ga. 102.

<sup>3</sup> *Wynne v. State*, 56 Ga. 113.

<sup>4</sup> *Shriver v. Sioux City, etc. R. R. Co.*, 24 Minn. 506.

<sup>5</sup> *Richards v. Doe*, 100 Mass. 524.

<sup>6</sup> *Leopold v. Van Kirk*, 29 Wis. 548.



ped.<sup>1</sup> And in an action to recover damages on account of the unsound condition of hams shipped from Iowa to Alabama, there being evidence that they were sound when shipped, it was held competent to show by expert testimony that if they were unsound when received in Alabama after an ordinary transit, they must have been unsound when shipped.<sup>2</sup>

The owner of a tan-yard, who had been engaged in the business of tanning for twenty-three years, "seeing the work going on and knowing how it was done," has been allowed to testify as an expert as to matters connected with such business, although he was not himself a practical tanner, but employed others to do the work for him.<sup>3</sup> A person who had peculiar opportunity for observing cotton, its nature and quality, its liability to catch fire and burn, has been allowed to testify that if a blazing missile, or a burning coal was applied to cotton, the cotton would be thereby fired immediately, and would burn with such rapidity that its extinguishment would be improbable, if not impossible.<sup>4</sup>

In an action brought for damages sustained from the giving away of an elevator in a hotel it was held that an expert could not answer the question whether the appearance of machinery would suggest to a prudent man the necessity of an examination. That was said to be a question for the jury.<sup>5</sup> But in the case last cited the court say that, the question to

<sup>1</sup> *Kershaw v. Wright*, 115 Mass. 361.

<sup>2</sup> *Forcheimer v. Stewart*, 73 Iowa, 216.

<sup>3</sup> *Nelson v. Wood*, 62 Ala. 175.

<sup>4</sup> *Seals v. Edmondson*, 71 Ala. 509.

<sup>5</sup> *Goodsall v. Taylor*, 41 Minn. 207.

what extent the apparent wear impaired the strength of the cable might have been a question for an expert.

In a recent case in Vermont the court decided that expert testimony was not admissible to show the shrinkage in measurement of hemlock bark as measured in the pile, and afterwards in the car, that being a matter of which the jury could judge from a description of the facts.<sup>1</sup>

Brown v. Doubleday, 61 Vt. 523.

## CHAPTER VII.

## EXPERT TESTIMONY IN HANDWRITING.

## SECTION.

121. Proof of Handwriting.
122. Testimony of Non-professional Witnesses.
123. When the Opinions of Such Witnesses are Inadmissible.
124. The Basis of Expert Testimony Concerning Handwriting.
125. Who are Experts in Handwriting.
126. Disqualification of Experts Arising from Bias.
127. Upon what Subjects Experts in Handwriting can Testify.
128. Genuineness of Writings as Determined by the Ink.
129. The Qualification of Experts in such Cases.
130. Comparison by Experts of Writings in Juxtaposition.
131. Statutory Provisions Concerning a Comparison of Writings.
132. Proof Under the Statutes.
133. Comparison by Experts with Writings Admittedly Genuine—In the Absence of Statutory Provision.
134. Comparison by Experts of Writings in Juxtaposition not Allowed in some States.
135. Comparison in Doubtful Cases—The Intermediate Theory of the South Carolina Courts.
136. The Right of Comparison with Writings Proven Genuine for the Purpose—Denied.
137. The Right of Comparison with Writings Proven Genuine for the Purpose—Affirmed.
138. Mode of Proof When Comparison is Allowed with Writings Proven Genuine for the Purpose.
139. Expert Should have Before Him in Court the Writings Compared.
140. Comparison with Photographic Copies.
141. Comparison with Letterpress Copies.
142. Comparison with Writings Made on the Trial.
143. Writings Admissible for Comparison in Orthography.
144. Comparison of Writings—The Use on Cross-examination of Fictitious Specimens.



- 145. Detection of Counterfeit Bank Notes.
- 146. Regulation of Such Evidence by Statutory Provision.
- 147. The Value of Expert Testimony as to Handwriting.

§ 121. **Proof of Handwriting.**—When any document purporting or proved to be thirty years old is produced from its proper custody, there is a presumption that the signature and every other part of the document which purports to be in the handwriting of any particular person is in that person's handwriting. And this presumption is not limited to formal instruments like wills and deeds, but it extends to letters, receipts, and all other ancient writings.<sup>1</sup> But in the case of writings not so old proof of genuineness must be made. If the person whose writing it purports to be is dead, or cannot be produced at the trial, or denies his signature, and there are no witnesses who saw the writing done, then proof of the handwriting of the party becomes essential. And it is with the making of such proof that this chapter is concerned.

§ 122. **Testimony of Non-professional Witnesses.**—1. When the genuineness of handwriting is in issue, the belief of any person is admissible who has seen the person write whose writing is the subject of dispute.<sup>2</sup> And the belief of such a witness is admis-

<sup>1</sup> *Wynne v. Tyrwhitt*, 4 B. & Ald. 376; *Fenwick v. Reed*, 6 Mda. 7; *Doe v. Beynon*, 12 A & E. 431; *Bertie v. Beaumont*, 2 Price, 307; *Bell v. Brewster*, 44 Ohio St. 690, 694; *Winn v. Paterson*, 9 Pet. 663; *Scharff v. Keener*, 64 Pa. St. 376; *Cahill v. Palmer*, 45 N. Y. 478; *Goodwin v. Jack*, 62 Me. 414; *Berry v. Raddin*, 11 Allen, 579.

<sup>2</sup> *De La Motte's Case*, 21 How. St. Tr. 810; *Miles v. Loomis*, 75 N. Y. 288, 295; *Bell v. Brewster*, 44 Ohio St. 690, 696; *State v. Gay*, 94 N. C. 814; *State v. Stair*, 87 Mo. 268, 274; *Long v. Little*, 119 Ill. 600; *Hopper v. Ashley*, 15 Ala. 463; *Moone v. Crowder*, 72 Ala. 79, 88; *State v. Thompson*, 80 Me. 194, 199; *Woodman v. Dana*, 52 Me. 9, 11; *National Bank v. Armstrong*, 66 Md. 113, 116.

sible, although he may have seen the person, whose writing is in question, write but once,<sup>1</sup> and that ten years<sup>2</sup> or twelve years before.<sup>3</sup> The opinion of a witness who had not seen the person write for nineteen years has been received.<sup>4</sup> So has the opinion of a witness who had never seen the party in question write anything but his name.<sup>5</sup> As is said in one of the cases "the law has fixed no limits to the measure of human capacity,"<sup>6</sup> and, therefore, will not undertake to define any specific number of times the witness must have seen the party write, or the limit of time within which the handwriting must have been seen by the witness. If the witness has ever seen the party write, and from the exemplar in his mind can form an opinion as to the genuineness of the signature, his opinion will be admissible for what it is worth. While the competency of the witness is not affected by the lack of frequency of observation, or the length of time which may have elapsed since the writing was seen, the weight to be attached to the testimony will necessarily much depend on these circumstances.<sup>7</sup>

2. But it is not in all cases necessary that the witness should have seen the party write, to enable him to identify the disputed writing. The opinion

<sup>1</sup> *Horne Tooke's Case*, 25 How. St. Tr. 71; *Wellman v. Wellman*, 8 C. & P. 380; *Garrells v. Alexander*, 4 Esp. 37; *Warren v. Anderson*, 8 Scott, 384; *Edelen v. Gough*, 8 Gill (Md.), 87; *Smith v. Walton* 8 Gill (Md.), 18; *Rediout v. Newton*, 17 N. H. 71; *Vinton v. Peck*, 14 Mich. 287, 293; *Pepper v. Barnett*, 29 Gratt. (Va.) 405; *State v. Scott*, 45 Mo. 302, 304.

<sup>2</sup> *Warren v. Anderson*, 8 Scott, 384.

<sup>3</sup> *Brachman v. Hall*, 1 Disney, 539.

<sup>4</sup> *Horne Tooke's Case*, 25 How. St. Tr. 71.

<sup>5</sup> *Garrells v. Alexander*, 4 Esp. 37.

<sup>6</sup> *Brachman v. Hall*, 1 Disney, 539.

<sup>7</sup> *Miles v. Loomis*, 75 N. Y. 288, 295.

of a witness may be received who has never seen the party write if he has received letters from him in answer to letters written by the witness, or under his direction, and addressed to the person whose writing is in question.<sup>1</sup>

It is, of course, quite possible that the correspondence may have been written by some other person, by the authority of the party whose name is used. But as ordinarily persons write their own letters, unless the letters indicate the contrary, the courts have established the principle that a witness who has never seen the party write is competent to testify if he has through correspondence acquired a knowledge of such party's handwriting.

3. The opinion of a person is admissible, although he may never have seen the person write whose signature is in dispute, nor received letters from him in reply to letters written by himself, provided writings purporting to have been written by such person have passed through the hands of the witness in the ordinary course of business. Thus, Lord Denman has said: "The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, nor received a letter from me."<sup>2</sup>

4. Likewise the opinion of a witness can be received where he has seen a signature which the per-

<sup>1</sup> Gould v. Jones, 1 W. Bl. 384; Harrington v. Fry, 1 C. & P. 289; Parsons v. McDaniel, 62 Ga. 100; Southern Ex. Co. v. Thornton, 41 Miss. 216; Atlantic Ins. Co. v. Manning, 3 Col. 228; Empire Manuf. Co. v. Stuart, 46 Mich. 482; Thomas v. State, 103 Ind. 419, 429; Hall v. Van Vranken. 28 Hun, 403, 404.

<sup>2</sup> Mudd v. Suckermore, 5 Ad. & Ell. 703.



son whose signature is disputed has acknowledged to be his.<sup>1</sup>

And in a recent case in North Carolina a witness was allowed to testify as to the handwriting of his uncle, he having seen many letters purporting to come from him to the father of witness, about family matters or family business, concerning which no one else was familiar.<sup>2</sup>

5. Moreover, a person is competent to express an opinion concerning the genuineness of a signature where the witness at the time of holding an official position, has, in the performance of his duties, become acquainted with the signature or writing of the person whose signature is in dispute.<sup>3</sup> Thus the signature of a justice of the peace may be proved by another public officer who has seen it as a certificate on papers filed in his office.<sup>4</sup>

§ 123. **When the Opinions of Non-Professional Witnesses are Inadmissible.**—Where the knowledge of an ordinary witness as to the handwriting of a person whose signature is the subject of dispute is acquired after the disputed signature is alleged to have been made, the witness may be incompetent to testify on the knowledge so acquired. Thus, in an early English case, Lord Kenyon rejected the evidence of a witness who stated that he had seen defendant write his name several times before the trial, he having written it in order to show the witness his true manner of writ-

<sup>1</sup> Hammond v. Varian, 54 N. Y. 398; Gordon v. Price, 10 Ired. (N. C.) 388.

<sup>2</sup> Tuttle v. Rainey, 98 N. C. 513.

<sup>3</sup> Yates v. Yates, 76 N. C. 142; Goddard v. Gloninger, 5 Watts, 209; Dungan v. Beard, 2 N. & M. 400; Doe v. Roe, 31 Ga. 599; Sill v. Reese, 47 Cal. 343; Amherst Bank v. Root, 2 Met. 523.

<sup>4</sup> Rogers v. Ritter, 12 Wall. 317.

ing, so that the witness might be able to distinguish it from his alleged signature.<sup>1</sup> The reason was, of course, the possibility that the defendant intentionally disguised his hand. And in a case decided a few years since in Illinois, a witness who had no acquaintance with the handwriting of the party until after a particular signature was denied, and who then examined such person's report as guardian, filed in the county court, and the signature thereto, was held not competent to express an opinion as to the genuineness of the signature in dispute. The court say: "This is clearly insufficient to entitle him to give his opinion in evidence. His knowledge was acquired under circumstances tending to bias his mind, imperceptibly though it may have been to himself. It is scarcely probable that he did not have some impression of the genuineness of the signature before he examined the guardian's reports. That he felt an interest in the question, is shown by the fact that he put himself to the trouble to make the examination. When, therefore, he investigated, however honest he may have believed himself to be, the natural tendency of his mind would most likely find something to confirm his preconceived opinion. In this way important differences may have been overlooked, and slight resemblances greatly magnified. Knowledge thus acquired is vastly different from that acquired by repeatedly seeing a handwriting, and scrutinizing it, when no unfavorable circumstances exist to arouse suspicion and excite the imagination.'"2

<sup>1</sup> *Stranger v. Searle*, 1 Esp. 14.

<sup>2</sup> *Board of Trustees v. Misenheimer*, 78 Ill. 22, 24 (1875). And see *Snyder v. McKeever*, 10 Brad. (Ill.) 190; *Reese v. Reese*, 90 Penn. 89.

When the statute provides that a person interested in the event shall not be examined as a witness in his own behalf, or interest concerning a personal transaction or communication between the witness and the deceased person, it has been held that such a witness is incompetent to prove the signature of the deceased to the instrument under which the witness claims.<sup>1</sup>

§ 124. **The Basis of Expert Testimony Concerning Handwriting.**— But the opinions of professional witnesses are also received on the subject of handwriting. Calligraphic experts have for years asserted the possibility of investigating handwriting upon scientific principles, and the courts have consequently admitted such persons to testify in cases of disputed handwriting. It is claimed that experiment and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting. For instance, it is asserted that in every person's manner of writing there is a certain distinct prevailing character, which can be discovered by observation, and being once known can be afterwards applied as a standard to try other specimens of writing, the genuineness of which is disputed.<sup>2</sup> Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organization of the writer. Hence, there is in each person's handwriting some distinctive characteristic, which, as being the reflex of his nervous organization, is necessarily independent of his own will, and unconsciously forces the writer to stamp the

<sup>1</sup> Garvey v. Owens, 37 Hun (N. Y.), 498.

<sup>2</sup> See Plunkett v. Bowman, 2 McCord, 139; Hanriot v. Sherwood, 82 Va. 19.



writing as his own. Those skillful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship; that the tendencies to angles or curves developed in the analysis of this characteristic may be mechanically measured by placing a fine specimen within a coarser specimen, and that the strokes will be parallel if written by the same person, the nerves influencing the direction which the will gives to the pen.

So, too, it is claimed that no two autograph signatures, written in a natural hand, will be perfect *fac-similes*. In the famous Howland will case,<sup>1</sup> Prof. Pierce, a very distinguished mathematician, at that time the professor of mathematics in Harvard University, testified that the odds were just exactly 2,866,000,000,000,000,000,000 to 1 that an individual could not with a pen, write his name three times so exactly alike as were the three alleged signatures of Sylvia Ann Howland, the testatrix, to a will and two codicils. The experts, therefore, claim, that if, upon superimposition against the light, they find that two signatures perfectly coincide, that they are perfect *fac-similes*, that it is a probability, amounting practically to a certainty, that one of the signatures is a forgery.

§ 125. **Who are Experts in Handwriting.**—It being granted that there is such a thing as a science of handwriting, it follows that the opinions of witnesses who are skilled in the science are admissible in evidence in accordance with a fundamental principle already considered.<sup>2</sup> It is of course error to

<sup>1</sup> 4 Am. Law Review, 625, 649

<sup>2</sup> See section 6, p. 19.

allow a witness, offered as an expert in handwriting, to give testimony in handwriting until an examination has shown that he is possessed of sufficient skill and experience to warrant the reception of his opinions. And the principle has been laid down in general terms that, whenever handwriting is a subject of controversy in judicial proceedings, the opinions of "witnesses who by study, occupation and habit have been skillful in marking and distinguishing the characteristics of handwriting" may be received in evidence.<sup>1</sup>

In passing on the qualifications of a witness to give expert testimony on the subject of handwriting the courts attach great importance to the avocation of the witness. If it has been such as naturally qualifies him to judge of handwriting, the court will allow him to testify as an expert. If, however, his business experience has not been such as to give him any special skill in the examination of disputed writings, he will not be permitted to testify as an expert, unless it is made to appear that he has in some other way acquired actual skill and scientific knowledge.<sup>2</sup> The rule is well laid down in a recent case in the Supreme Court of California, where it is said that the witness "must have been educated in the business about which he testifies; or it must first be shown that he has acquired actual skill and scientific knowledge upon the subject."<sup>3</sup> If the witness has really acquired actual skill and scientific knowledge upon the subject of handwriting, he is none the less an expert because he has not happened to have been in situations where his duty required

<sup>1</sup> Sweetser v. Lowell, 33 Me. 450.

<sup>2</sup> State v. Tompkins, 71 Mo. 616; Wagner v. Jacoby 26 Mo. 530.

<sup>3</sup> Goldstein v. Black, 50 Cal. 464.

him to distinguish between genuine and counterfeit handwriting.<sup>1</sup>

The fact that the expert has no other knowledge of the writing in dispute than that derived by a comparison of the disputed writing with others that are genuine, is not regarded as any disqualification whatever.<sup>2</sup> This must be regarded as the rule, although it was laid down at one time that an expert who had never seen the party write could not give his opinion as to the genuineness of the writing in question based solely on a comparison of writings, but that he was to testify to the condition and appearance of the words, and of the letters and characters contained in the writings, and point out and explain similarities and differences.<sup>3</sup> When an expert acquires a knowledge of the handwriting of a person by simply observing him write several times, and this for the purpose of testifying, it is laid down that he is incompetent to give an opinion as to the genuineness of that person's signature.<sup>4</sup> It is quite possible that the party may have written differently through design.<sup>5</sup>

Mere opportunity afforded for observation of handwriting does not of itself qualify one to give testimony as an expert in the science of handwriting, and the mere fact that a witness has sometimes compared the signatures of individuals, where disagree-

<sup>1</sup> Sweetser v. Lowell, 33 Me. 450.

<sup>2</sup> Miles v. Loomis, 75 N. Y. 287; State v. Shinborn, 46 N. H. 497; Calkins v. State, 14 Ohio St. 222; Macomber v. Scott, 10 Kan. 335; Moody v. Rowell, 17 Pick. (Mass.) 490.

<sup>3</sup> Roe v. Roe, 40 N. Y. Superior Ct. 1; Frank v. Chemical National Bank, 37 Ib. 30.

<sup>4</sup> Reese v. Reese, 90 Pa. St. 89. And see § 123.

<sup>5</sup> Stranger v. Searle, 1 Espinasse, 14. And see Springer v. Hall, 93 Mo. 693, 697.



ments as to their genuineness have arisen, has been held not sufficient to render him competent to testify as an expert in disputed writings.<sup>1</sup> It is not necessary to constitute one an expert and qualify him to testify as to a comparison of handwritings, that he should have made a comparison of handwriting a single specialty. As said in one of the cases: "It is enough that he has been engaged in some business which calls for frequent comparisons, and that he has in fact been in the habit for a length of time of making such comparisons."<sup>2</sup>

In Iowa the court has been somewhat liberal in its determination of what is necessary to qualify one as an expert in handwriting. According to the view taken by that court it would appear that almost any business man is qualified to express an opinion as an expert in such cases. A witness has there been held competent, who testified on his preliminary examination that he did not consider himself an expert in handwriting, and had never made it a business to compare or detect feigned or forced handwriting. That he presumed he had some skill in comparing handwriting, but did not pretend to any extra skill, simply thinking that he was *as good a judge as business men generally*. He had been a clerk in a store, the editor of a newspaper, and for the last fifteen years a lawyer. He had examined a good deal of writing, and said he had been in the habit of examining bank bills to test their genuineness. So, in the same case, a merchant was held competent, who did not profess to be an expert, but had examined bank bills to detect counterfeits.<sup>3</sup> A witness who

<sup>1</sup> Goldstein v. Black, 50 Cal. 464.

<sup>2</sup> Ort v. Fowler, 31 Kan. 478, 486.

<sup>3</sup> Hyde v. Woolfolk, 1 Iowa, 159.

merely professed to be as good a judge of handwriting as business men generally, would certainly not be regarded in some courts as possessing the peculiar skill of an expert. But the court say that, "It is true that persons giving evidence on a matter pertaining to their particular science, trade or art, come most strictly and technically under the term 'experts,' but we cannot consent to the proposition that no others come within it, and are allowed to be witnesses in any case. It may very probably be true, that none are to be taken as experts on matters pertaining to a particular calling, art or science, but those who are, or have been practiced, in such art or science. But there are many subjects of inquiry which do not belong to a particular art, etc., but on which a greater or less degree of knowledge is common to many men in different callings." And the court concluded that a comparison of writings did not present such an inquiry as required a witness of a particular calling as an expert, but that his competency depended on his means of knowledge as a business man and his intelligence.

When a witness testified "I am an expert in writing, by having written a great deal, and by having seen and read a great deal of writing," the Court of Appeals of Texas said, "The witness qualified himself fully as an expert."<sup>1</sup> In another case in the same court it was held that error was committed in allowing a witness to testify as an expert who stated that "he had been engaged in the banking business about five years, and was more or less experienced in handwriting—that his clerks did the most of his correspondence, etc. He had little occasion to exer-

<sup>1</sup> *Chester v. State*, 23 Tex. Ct. of App. 583.

cise in comparing handwriting, and did not consider himself an expert—was never before called to testify in a case as an expert; seldom had occasion in his business to compare handwriting; thought he could tell handwriting by comparison; thought he could by comparing two written instruments, tell whether or not they were written by the same person; did not consider himself an expert in comparing handwriting.”<sup>1</sup> The Supreme Court of Missouri declares that “one who does not profess to be an expert in handwriting, or whose avocation in life has not been such as to qualify him to judge of handwritings, should not be permitted to testify as an expert.”<sup>2</sup>

1. Writing engravers, accustomed accurately to examine the formation of letters in different handwritings, and who have acquired skill from their occupation of making engravings of handwritings, are allowed to testify as experts.<sup>3</sup>

2. So are tellers<sup>4</sup> and cashiers<sup>5</sup> of banks, who have acquired skill in passing on the genuineness of signatures to notes and checks. And in general any officer of a bank whose business it is to examine papers with a view of detecting alterations and erasures, and ascertaining genuine from spurious writings, is an expert in questions pertaining to handwriting.<sup>6</sup>

3. A clerk in a post-office, accustomed to the in-

<sup>1</sup> Heacock v. State, 13 Tex. Ct. of App. 97, 130.

<sup>2</sup> State v. Tompkins, 71 Mo. 613.

<sup>3</sup> Spear v. Bone, cited in 5 A. & E. 709; Regina v. Williams, 8 C. & P. 34; Norman v. Morell, 4 Vesey Ch. 768; Turnbull v. Dodds, 6 D. (S. C.) 901.

<sup>4</sup> Speiden v. State, 3 Tex. Ct. of App. 159.

<sup>5</sup> Dubois v. Baker, 30 N. Y. 355, 361; People v. Hewitt, 2 Parker's Cr. Cas. 20; State v. Phair, 48 Vt. 366, 369; Lyon v. Lyman, 9 Conn. 59, 60; Murphy v. Hagerman, Wright (Ohio), 293.

<sup>6</sup> Pate v. People, 3 Gilm. (Ill.) 644, 659.



spection of franks for the detection of forgeries, is deemed to possess the qualifications of an expert.<sup>1</sup>

4. A book-keeper or cashier of a commercial house who has had experience in the examination of handwriting to determine its genuineness has been held competent to testify as an expert.<sup>2</sup>

5. A writing master has testified as an expert, the question being whether a writing was in a natural or simulated hand.<sup>3</sup>

6. A sheriff of a county<sup>4</sup> and a county clerk,<sup>5</sup> each having been accustomed to pass on the genuineness of signatures, have been permitted to testify as experts on the subject.

7. A lawyer has been held competent to testify as an expert, he having stated on his preliminary examination that he had occasion to examine handwriting with a view to comparison of writings, that he had been called to the stand as a witness in regard to them, a good many times; that he had never made a business of criticising writing, but had been accustomed to do it, and supposed he could identify handwriting pretty well.<sup>6</sup>

§ 126. **Disqualification of Expert Arising from Bias.**—In a case in the Circuit Court of the United States for the District of South Carolina the government called as an expert in handwriting a post-office inspector. It appeared on the preliminary examination concerning his qualifications that he had been detailed by the post-office department to examine into and collect the facts of the case; that he had

<sup>1</sup> Revett v. Braham, 4 Term, 49.

<sup>2</sup> State v. Ward, 39 Vt. 225.

<sup>3</sup> Moody v. Rowell, 17 Pick. (Mass.) 490.

<sup>4</sup> Yates v. Yates, 76 N. C. 142.

<sup>5</sup> State v. Phair, 48 Vt. 366, 369.

<sup>6</sup> State v. Phair, 48 Vt. 366, 369.

hunted up the testimony, and had busied himself in the inception and prosecution of the case. The defendant thereupon objected to his competency, and the objection was sustained, the court saying: "Where the person called to testify as an expert is one occupying the relation to the case which this witness does—saturated with bias against the defendant, honestly convinced of his guilt, and, in the conscientious discharge of his duty, seeking to bring him to punishment—he can afford the jury no efficient aid in coming to a fair and impartial conclusion. His evidence as an expert to the point indicated will not be admitted."

§ 127. **Upon what Subjects Experts in Handwriting can Testify.**—Experts in handwriting are permitted to express an opinion on the question whether a writing is in a natural or simulated hand;<sup>2</sup> whether it appears more cramped and confined than the hand which the writer usually wrote;<sup>3</sup> and as to which of two instruments exhibits the greater ease and facility of writing.<sup>4</sup> They have been permitted to testify that a certain writing bore the appearance of having been touched by a pen a second time, as if done by some one attempting to copy or imitate the handwriting of another.<sup>5</sup> And on an indictment for uttering a forged will, which, together with writings in support

<sup>1</sup> *United States v. Mathias*, 36 Fed. Rep. 892, 894.

<sup>2</sup> *Queen v. Shepherd*, 1 Cox Cr. Cas. 237; *Goodtitle v. Braham*, 4 Term, 497; *Rex v. Cator*, 4 Esp. 117; *Spear v. Bone* (M. S.), cited in 5 A. & E. 709; *Reilly v. Rivett*, 1 Cases in Eng. Eccls. Cts, 43, note a; *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295; *Burdick v. Hunt*, 43 Ind. 381; *Miles v. Loomis*, 17 Hun (N. Y.), 372; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; *People v. Hewitt*, *Parker Cr. Cas.* 20. See p. 303.

<sup>3</sup> *Dubois v. Baker*, 30 N. Y. 355, 362.

<sup>4</sup> *Demerritt v. Randall*, 116 Mass. 331.

<sup>5</sup> *Spear v. Bone*, *supra*.

of it, it was suggested had been written over pencil marks which had been rubbed out, the testimony of an engraver was received, who had examined the paper with a mirror and traced the pencil marks.<sup>1</sup>

It has been held competent to ask an expert whether certain parts of a writing could have been made with a pen, but not whether it could have been made with an instrument which was found in the possession of the defendant.<sup>2</sup> So an expert may testify whether two documents were written with the same pen and ink, and at the same time.<sup>3</sup> And when it is alleged and denied that the body and signature of an instrument are in the same handwriting, he may be asked to express an opinion whether the two parts were written by the same person.<sup>4</sup>

Where one writing crosses another, an expert may testify which in his opinion was written first.<sup>5</sup> His opinion has also been taken on the question, whether certain words on a paper shown him, were written before or after the paper was folded.<sup>6</sup> And the judicial committee and lords of the privy council have called an expert for the purpose of obtaining his opinion as to whether a circumflex line, surrounding the names of the witnesses to a will, was made before or after the signature.<sup>7</sup>

In consequence of a deed having been drawn up

<sup>1</sup> *Regina v. Williams*, 8 Car. & P. 34.

<sup>2</sup> *Commonwealth v. Webster*, 5 Cush. (Mass.) 295.

<sup>3</sup> *Fulton v. Hood*, 34 Pa. St. 365; *Quinsigmond Bank v. Hobbs*, 11 Gray (Mass.), 250. See p. 304.

<sup>4</sup> *Reese v. Reese*, 90 Pa. St. 89.

<sup>5</sup> *Cooper v. Bockett*, 4 Moore P. C. 433; *Dubois v. Baker*, 30 N. Y. 355.

<sup>6</sup> *Bacon v. Williams*, 13 Gray (Mass.), 525.

<sup>7</sup> *Cooper v. Bockett*, 4 Moore P. C. 433.



"in an unusual and slovenly manner, and so as at first sight to cause doubt as to the genuineness of a part of it," Chief Justice MEREDITH ordered an *expertise* in the Quebec Court of Review, and this course was not disapproved of either by the Court of Appeals or the Lords of the Privy Council.<sup>1</sup>

It is well settled that expert testimony is admissible upon the question of the alteration<sup>2</sup> or erasure of writings.<sup>3</sup> A holograph will, in which alterations and interlineations appeared, has been admitted to probate upon the testimony of an expert, that in his opinion, the alterations were written at the same time as the rest of the will.<sup>4</sup> An expert accustomed to the use of the microscope, having examined the note in question through that instrument, has been allowed to testify that the word "year" in the body of the note had been erased, and the word "day" written upon the erasure.<sup>5</sup> So an expert has been permitted to express an opinion, that a note has been altered by the substitution of one figure for another,<sup>6</sup> and whether certain words in a writing had been cancelled.<sup>7</sup>

An engraver has been examined as to an illegible writing,<sup>8</sup> and, in general, the testimony of experts is admissible whenever the writing is obscure and diffi-

<sup>1</sup> See *Hamel v. Panet*, 3 Quebec Law R. 173, 175.

<sup>2</sup> *Moye v. Herndon*, 30 Miss. 118; *Vinton v. Peck*, 14 Mich. 287; *Pate v. The People*, 3 Gilm. (Ill.) 644.

<sup>3</sup> *Edelin v. Sander's Exr.* 8 Md. 118; *Yates v. Waugh*, 1 Jones (N.C.) Law, 483. See *Swan v. O'Fallon*, 7 Mo. 231; *Wagner v. Jacoby*, 26 Mo. 530.

<sup>4</sup> *In the Goods of Hindmarch*, 1 P. & M. 307.

<sup>5</sup> *Dubois v. Baker*, 30 N. Y. 355.

<sup>6</sup> *Nelson v. Johnson*, 18 Ind. 329.

<sup>7</sup> *Beach v. O'Riley*, 14 W. Va. 55.

<sup>8</sup> *Norman v. Morell*, 4 Vesey Ch. 768.

cult to be deciphered.<sup>1</sup> If the writing is ancient, an expert may state his belief as to the probable period at which it was written.<sup>2</sup> But in a recent case in Nebraska the opinion is expressed that the question of the age of a written paper is not one of science or skill so as to make admissible the opinion of an expert upon its mere inspection.<sup>3</sup> The judge writing the opinion of the court in that case says: "Whatever reading, examination, and reflection I have been able to give to the case, has led me to the conclusion that it does not present a question of science, skill, or trade, nor one of a like kind. In other words, I do not think that any amount of science, study, or skill would enable a person by mere inspection, to judge or testify of the age of handwriting with that accuracy necessary to its value or safety in judicial proceedings. The appearance of a written paper, some years, or even months old, will depend greatly upon the color, kind and quality of the ink used, and greatly upon the receptacle or place where the paper has been kept, whether excluded from the air or sunshine, whether in a dry or damp, hot or cool place, and other conditions, the knowledge of which must be derived from sources other than inspection. Again, there is no recognized science or trade in which it can be said to be necessary that persons engaged in it should be skilled in detecting the age of writings by inspection. The science of the law, perhaps,

<sup>1</sup> *Masters v. Masters*, 1 P. Wm. 425; *Stone v. Hubbard*, 7 Cush. (Mass.) 595. It is a question for the jury and not for the court to decipher illegible letters or figures: *Armstrong v. Burrows*, 6 Watts. 266, 268.

<sup>2</sup> *Tracy Peerage Case*, 10 Cl. & Fin. 154; *Doe v. Suckermore*, 5 Ad. & Ellis, 703, 718. See section 128; also pp. 307, 309.

<sup>3</sup> *Cheney v. Dunlap*, 20 Neb. 265, 271, (1886).

comes nearer to it than any other, and the instances in which it becomes necessary or even useful that the legal practitioner should possess such skill are very rare.” It has been held that an expert could not express an opinion that certain words were interpolated into a written agreement after the signature was affixed, if such opinion was founded on the situation and crowded appearance of the words.<sup>1</sup> And how much a man can improve his handwriting in a short time, is not a subject for the testimony of experts. It has been held, therefore, improper to ask an expert whether a man could, within a short time, so improve his handwriting, as shown by the standard signatures of the testator, as to make a signature of as good a handwriting as that of the will.<sup>2</sup>

When a plaintiff, in a proceeding to cancel the deed, alleged that while drunk he was induced by the fraudulent representations of the defendant to make him a deed for land, the defendant saying it was only an arbitration bond, an expert was allowed to state whether there was any difference between two signatures of the plaintiff—the one to the deed in question and the other an affidavit filed in the cause.<sup>3</sup> Expert testimony is admissible as to the characteristics of different signatures,<sup>4</sup> and as to whether certain signatures presented the appearance of “simulated imitations.”<sup>5</sup>

In a case in Texas an expert made an imitation or copy of the signature of the person whose signa-

<sup>1</sup> *Jewett v. Draper*, 6 Allen (Mass.), 434.

<sup>2</sup> *McKeone v. Barnes*, 108 Mass. 344, 347.

<sup>3</sup> *McLeod v. Bullard*, 84 N. C. 515.

<sup>4</sup> *Riordan v. Gugerty*, 74 Iowa, 688.

<sup>5</sup> *Ludlow v. Warshing*, 108 N. Y. 520. See cases cited, p. 299.



ture was in dispute, and the copy or imitation was exhibited to and handed to the jury along with the signature of that person, for their inspection and comparison, in order to show how easily the name could be counterfeited or forged. This evidence was held to be "wholly immaterial and inadmissible. It could throw no light on the transaction. It might have been perfectly easy for Boyd (the expert) to counterfeit this signature or any other, and still that fact did not tend in the slightest degree to prove either that defendant did it or that he was competent even to do it."<sup>1</sup>

In a case in Illinois where an action was brought on a note, and a pen and ink line had been drawn through the printed words, "if not paid at maturity," the question being as to the time when this line was drawn, it was held that the subject-matter of inquiry required no peculiar habits or study, no scientific language to understand it, and that it was error to allow so-called experts to express an opinion in regard to it.<sup>2</sup>

§ 128. **The Genuineness of Writings as Determined by the Nature of the Ink.**—Where a writing purports to be of ancient or recent date, the testimony of experts who have made a micro-chemical examination of the ink in which the instrument is written, is received to show the nature of the ink, whether it was found fresh or old, and whether it was of such a nature as to grow old rapidly.<sup>3</sup> Such testimony is also received when the question arises whether a portion of the writing was made at a time different from that at which the rest of the instru-

<sup>1</sup> Thomas v. State, 18 Tex. Ct. of App. 213, 218.

<sup>2</sup> Collins v. Crocker, 15 Brad. (Ill.) 107. See p. 300.

<sup>3</sup> See 18 Am. Law Register (N. S.), 273, 282.

ment was written, or whether different inks were employed.<sup>1</sup> Cases have been referred to in the sections immediately preceding this, showing that experts are permitted to express an opinion as to the probable time at which an instrument was written, whether different parts of the same instrument were written at the same time, and with the same ink, and where two writings cross each other, as to which was written first. In all these inquiries much light can be obtained from experts skillful in the micro-chemical examination of inks. The importance of such testimony is well illustrated by a case decided in the Supreme Court of Michigan, where an exact similarity in the ink used in executing two different instruments, bearing different dates, was treated in connection with other suspicious facts, as tending to indicate that both writings were made at the same time.<sup>2</sup>

When two writings cross each other, if the writing was done with a different kind of ink, the question which was the superposed ink may be easily determined by wetting a piece of paper with a com-

<sup>1</sup> *Ibid.* 288. A distinguished expert in the scientific investigation of handwriting, there gives an interesting account of a case of this nature, which happened to come within his personal experience. It shows how the difference in inks may often be ascertained by means of a photographic copy of the writing. He says: "The photograph is able to distinguish shades of color which are inappreciable to the naked eye; thus where there is the least particle of yellow present in a color it will take notice of the fact by making the picture blacker, just in proportion as the yellow predominates, so that a very light yellow will take a deep black. So any shade of green, or blue, or red, where there is an imperceptible amount of yellow, will print by the photographic process more or less black; while either a red or blue, verging to a purple, will show more or less faint, as the case may be. Here is a method of investigation which may be very useful in such cases, and which will give no uncertain answer." In *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154, the difference in the color of the ink used was taken into consideration.

<sup>2</sup> *Shel-louv. Warner*, 45 Mich. 638.

pound which acts as a solvent of ink. By pressing the paper upon the writing in question, a thin layer of the superposed ink will be transferred to the prepared paper, thereby furnishing an answer to the question propounded. If the same kind of ink was used, the case presents greater difficulties, and other methods are resorted to. But to attempt to determine the question, as it is often done by the aid of the eye or the magnifying glass, is said to be no better than guess-work.<sup>1</sup>

§ 129. **The Qualifications of Experts in Such Cases.**—In all cases where opinions are desired predicated upon the nature of the ink used, an expert microscopist and chemist, accustomed to the examination of inks for the purpose of determining the nature and properties of different inks, and the age of writings, would unquestionably be competent to express an opinion. But whenever the question relates to the age of a writing, an expert who has simply been in the habit of studying the genuineness of handwriting, for the mere purpose of determining whether it was in the handwriting of the person by

<sup>1</sup> 18 Am. Law Reg. (N. S.) 273, 287, where a microscopic and chemical expert in the examination of writings, says: "I took for the purpose of my experiment ten of the most common kinds of ink found in the market, and drew a series of lines, three in number, with each kind of ink, across a sheet of paper. This was followed by a similar series drawn diagonally across the first, thus forming a hundred points of crossing, and placing each kind of ink above and also under all the others. In thirty-seven cases out of the hundred, the eye, with or without the glass, saw the under ink as if it were on the surface; in forty cases nothing could be decided in this respect; the balance told the truth of the matter. By the other method, that is, by the use of the solvent, the true facts could be made plain in every one of these cases. This experiment, as will be seen, was made with ten kinds of ink more or less differing from each other in color and in chemical composition, and it certainly proves that all such testimony, as I have said, has been thus far no better than guess-work."



whom it purported to have been written, would not be competent to express an opinion.<sup>1</sup> For that involves a question in a very different department of inquiry, and it is necessary that the witness should have made that subject a matter of special study and investigation. The courts cannot be too careful in passing on the qualification of witnesses offered as experts in this particular line of inquiry.<sup>2</sup>

In a case decided in the Supreme Court of North Carolina in the year 1854, the defendant contended that although the instrument declared on was in the handwriting of the testator, yet the body of it was a forgery, the original having been removed by some chemical process, and the present writing substituted. To show this a witness was introduced who was not a professed chemist, and who knew little or nothing about the science. The trial court permitted him to testify that he had just seen an experiment performed, whereby legible writing with ordinary ink had been erased and extracted from a piece of paper (which he then held in his hand), by the application of certain chemicals. The object of the testimony was to show that ink might be removed from paper without injuring its texture. The Supreme Court held that he was not

<sup>1</sup> Clark v. Bruce, 19 N. Y. Sup. Ct. (12 Hun), 271, 273. See, too, Ellingwood v. Bragg, 52 N. H. 488; Cheney v. Dunlap, 20 Neb. 265.

<sup>2</sup> "I have repeatedly," says an expert, "examined papers which have been made to appear old by various methods, such as washing with coffee, with tobacco water, and by being carried in the pocket near the person, by being smoked and partially burnt, and in various other ways. I have in my possession a paper which has passed the ordeal of many examinations by experts and others, which purports to be two hundred years old, and to have been saved from the Boston fire. The handwriting is a perfect *fac-simile* of that of Thomas Addington, the town clerk of Boston, two hundred years ago, and yet this paper is not over two years old." 18 Am. Law Reg. (N. S.) 273, 289.

properly qualified.<sup>1</sup> That the witness was not qualified to give testimony as an expert is entirely clear, but it is somewhat difficult to understand why he was not competent to testify in the character of an ordinary witness, to the fact which he had observed, namely, that certain effects followed the application of the chemicals to the paper in the instances which he witnessed.

In a case decided in the Supreme Court of California, the testimony showed that a powder, composed of three parts of hydro-carbonate of soda to one part of chlorate of potash, was found in the baggage of one of the defendants, whereupon a police officer was permitted to testify that he had used a portion of the powder found by him in the defendant's baggage, in connection with muriatic acid, for the purpose of extracting ink from paper, and that, with the use of a camel's hair brush, he had extracted the ink from two checks—one prepared by counsel of defendant and the other written in imitation of the original check and with the same kind of ink. That the ink was extracted from the body of the checks without affecting the signatures, and leaving the parts where the ink was extracted perfectly white, the texture of the paper being uninjured.<sup>2</sup> Here the witness was not an expert, but he was permitted to testify to the facts which he had observed.

However, in a case in Iowa, a witness who had been a teacher of penmanship for twenty-five years, and other witnesses who were attorneys, all of whom testified that they were familiar with old papers and writings, and thought they were capable of giving an

<sup>1</sup> *Otey v. Hoyt*, 2 Jones (N. C.) Law, 70.

<sup>2</sup> *People v. Brotherton*, 47 Cal. 395, 402.

opinion on the question, were held competent to testify as experts that a certain instrument was of recent origin. The court said: "We do not think it was necessary, to qualify a witness to testify upon the question, that he should be a chemist, and have knowledge of the chemical composition of ink."<sup>1</sup>

§ 130. **Comparison by Experts of Writings in Juxtaposition.**—There are two distinct methods of judging of the genuineness of handwriting by means of comparison. According to one method, a witness who has acquired personal knowledge of another's handwriting, by having seen such person write, or by having received letters from him in due course of business, may have formed in his mind an exemplar of the individual's handwriting, so that, upon the presentation of a signature, he can say, by comparing it with the exemplar in his mind, whether it corresponds or not with such exemplar. According to the other method, a witness who has no personal knowledge of another's handwriting, and therefore, no exemplar in his mind, has before him in juxtaposition the writing in dispute with other writings admitted or proved to be genuine, and from a comparison of such writings expresses an opinion whether the writings were made by the same person. The first is the comparison which the ordinary witness makes, when testifying from personal knowledge. The second is the comparison which an expert makes, testifying without personal knowledge.

In France, papers admitted to be genuine, and writings of a public nature, such as signatures written in the presence of a notary or judge, or written or signed in a public capacity, are submitted to

<sup>1</sup> *Eisfield v. Dill*, 71 Iowa, 442, 445. But see p. 302.



sworn experts, appointed by the court, for comparison with the disputed writing.<sup>1</sup> In England, a comparison of handwriting placed in juxtaposition has always been permitted in the ecclesiastical courts.<sup>2</sup> But in the common-law courts a different rule was adopted, and experts were not allowed in those courts to express an opinion based on a comparison of hands placed in juxtaposition,<sup>3</sup> until the year 1854, when Parliament passed an act, hereafter set forth, which authorized such comparison to be made. But in the case of ancient documents, so old that they could not be authenticated by living witnesses, opinions based on a comparison of hands in juxtaposition were admitted from necessity, even in the common-law courts.<sup>4</sup>

In this country a difference of opinion has prevailed, and some of our State courts have denied, while others have maintained the right to introduce the testimony of experts based on a comparison of writings placed in juxtaposition. But in this country, as in England, there has been unanimity in holding that such evidence is admissible in the case of ancient documents.<sup>5</sup>

<sup>1</sup> Code de Procedure Civile, Part I., § 2, tit. 10, § 200.

<sup>2</sup> *Beaumont v. Perkins*, 1 Phillimore, 78; *Reily v. Rivett*, Prerog. 1792, 1 Cases in Eng. Ecc. Cts. 43, note *a*; *Heath v. Watts* Prerog. 1798, *Ibid.* note *b*; *Saph v. Atkinson*, 2 Eng. Ecc. R. 64, 88, 89; *Machin v. Grindon*, 2 Cas. temp. Lee, 335; s. c., 2 Addams, 91, note *a*; 1 Oughton's *Ordo Judiciorum*, tit. 225, De Comparatione Litterarum, etc., §§ 1, 2, 3, 10, 11 (1728).

<sup>3</sup> *Doe v. Suckermore*, 5 Ad. & Ellis, 703.

<sup>4</sup> *Morewood v. Wood*, 14 East, 327, note *a*; *Rowe v. Rawlings*, 7 East, 282, note *a*; *Taylor v. Cook*, 8 Price, 650; *Doe v. Tarver*, R. & M. 141; *Doe v. Suckermore*, 5 Ad. & Ellis, 703, 717, 724. So in Canada, *Thompson v. Bennett*, 2 Upper Canada (C. P.) 393, 405, 406.

<sup>5</sup> *West v. State*, 22 N. J. Law, 241, 242; *Clark v. Wyatt*, 15 Ind. 271; *Wilson v. Betts*, 4 Denio (N. Y.), 201; *State v. Givens*, 5 Ala. 754; *Kirksey v. Kirksey*, 41 Ala. 626, 640; *Strother v. Lucas*, 6 Pet. 763, 767.

We have seen in the preceding section that non-professional witnesses, who have personal knowledge of the handwriting of a person whose signature is in dispute, are competent to testify as to their opinion concerning the genuineness of the signature. While the opinions of such witnesses are thus received, yet the general rule does not permit them to express an opinion when the opinion is based solely on a comparison of writings placed in juxtaposition. In States where a comparison is allowable it can be made by an expert but not by an ordinary witness.<sup>1</sup> An ordinary witness, however, can make a comparison of the disputed signature with a writing which he possesses and which he personally knows is the writing of the person whose signature is in dispute.<sup>2</sup> But in South Carolina the witness, in order to express an opinion based on a comparison of hands, need not be a professional expert.<sup>3</sup>

§ 131. **Statutory Provisions Concerning a Comparison of Writings.**—All dispute as to the right to receive the testimony of experts based on a comparison of hands has been put to rest in England, and in some of the States of this country by statutory provisions adopted for that purpose. These provisions differ somewhat, some of them being more restricted than others. They are as follows:

*England.*—“Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence

<sup>1</sup> *McKay v. Lasher*, 42 Hun (N. Y.), 270; *Mixer v. Bennett*, 70 Iowa, 329; *Moons v. Crowder*, 72 Ala. 79; *Hyde v. Woolfolk*, 1 Iowa, 159; *State v. Owen*, 73 Mo. 440; *Williams v. Conger*, 125 U. S. 397, 413.

<sup>2</sup> *Worth v. McConnell*, 42 Mich. 473, 475.

<sup>3</sup> *Benedict v. Flanigan*, 18 S. C. 506; *United States v. Mathias*, 36 Fed. Rep. 892, 894.

of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."<sup>1</sup>

*California*.—"Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge."<sup>2</sup>

*Georgia*.—"Other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purpose of comparison by the jury. Such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial."<sup>3</sup>

*Iowa*.—"Evidence respecting handwriting may be given by comparison made by experts or by the jury, with writings of the same person which are proved to be genuine."<sup>4</sup>

<sup>1</sup> 28 and 29 Victoria, ch. 18, § 8. In 1854 a similar provision was passed, but it was confined in its operation to the admission of evidence in civil cases. 17 and 18 Vict., ch. 125. But in 1865 the provision was made applicable alike to civil and criminal cases. In reference to this provision it is laid down as follows: "Under this statutory law it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge (see *Eagan v. Cowen*, 30 Law Times, 223, in Ir. Ex.), may be used for the purpose of comparison, although they may not be admissible in evidence for any other purpose in the cause (*Birch v. Ridgway*, 1 Fost. & Fin. 270; *Cresswell v. Jackson*, 2 Fost. & Fin. 24); and next, that the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves (*Cobbett v. Kilminster*, 4 Fost. & Fin. 490, per Martin, B.), or in the event of there being no jury, by the court." 2 Taylor's Evidence, § 1668. It is to be observed, however, that this statute expressly provides that it is not to apply to Scotland.

<sup>2</sup> Code of Civil Procedure (1868), § 1944.

<sup>3</sup> Revised Code (1873), p. 674, § 3840.

<sup>4</sup> Code (1873), § 3655; 2 McClain's Annotated Code and Statutes (1888), p. 1446, § 4905.



*Nebraska.*—“Evidence respecting handwriting may be given by comparisons made by experts or by the jury, with writings of the same person which are proved to be genuine.”<sup>1</sup>

*New Jersey.*—“In all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and such writings, and the testimony of witnesses respecting the same, may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute; *provided, nevertheless*, that where the handwriting of any person is sought to be disproved by comparison with other writings made by him, not admissible in evidence in the cause for any other purpose, such writings, before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy.”<sup>2</sup>

*New York.*—“Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.”<sup>3</sup>

<sup>1</sup> Compiled Statutes (1889), p. 900, § 341.

<sup>2</sup> Revision (1877), p. 381, § 19.

<sup>3</sup> Laws of 1880, ch. 36, p. 141.

*Oregon.*—"Evidence respecting the handwriting may also be given, by a comparison made by a witness skilled in such matters, or the jury, with writing admitted or treated as genuine by the party against whom the evidence is offered."<sup>1</sup>

*Rhode Island.*—"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses. and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."<sup>2</sup>

*Texas.*—"It is competent in every case to give evidence of handwriting by comparison, made by experts or by the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath."<sup>3</sup>

*Wisconsin.*—"Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings; and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."<sup>4</sup>

In the large majority of the States this question is not regulated by statute, but is determined by the courts according to their views of the common law.

§ 132. **Proof under the Statutes.**—It will be no-

<sup>1</sup> Hill's Ann. Laws (1887), vol. 1., § 765.

<sup>2</sup> Public Statutes (1882), p. 588, § 42.

<sup>3</sup> Revised Statutes (1879), Code of Crim. Procedure, Art. 754. And see *Heard v. State*, 9 Tex. Ct. of App. 1, 19; *Phillips v. State*, 6 Tex. Ct. of App. 331; *Hatch v. State*, 6 *Ib.* 384; *Eborn v. Zimmerman*, 47 Tex. 503.

<sup>4</sup> Sanborn & Berryman's Ann. Stat. (1889), vol. 2, p. 2157, § 4189a.

ticed in reference to the above statutory provisions that in some it is provided that the writing shall be proved genuine "to the satisfaction of the court" or "of the judge," while in others the provision simply is that a comparison can be made with writings "proved to be genuine." Under this last provision the New York court says it seems that the proof is addressed to the jury.<sup>1</sup> But we do not so understand it. In those States where a comparison of writings is allowed, independently of statutes, with writings proved to be genuine, the question of proof is addressed to the court.<sup>2</sup> And we see no reason for any distinction between the two classes of cases.

When the statutes permit a comparison with any writing proved to the satisfaction of the court to be genuine, it is evident that the proof of genuineness is not only addressed to the court, but that it is analogous to evidence tending to prove the competency of one who is called as an expert and the like. And the New York court has consequently held that inasmuch as the evidence is addressed to the court, error cannot be alleged in respect to it.<sup>3</sup> The manner of proving the genuineness of the writing in that State seems to rest exclusively in the judgment of the trial court.<sup>4</sup>

Under the code of Iowa allowing a comparison with writings "which are proved to be genuine," the court has held that a comparison could not be made with a certificate of acknowledgment to a mortgage purporting to be executed by the person whose

<sup>1</sup> See *Hall v. Van Vranken*, 28 Hun, 403, 406.

<sup>2</sup> See section 138.

<sup>3</sup> *Hall v. Van Vranken*, 28 Hun, 403.

<sup>4</sup> *McKay v. Lasher*, 50 Hun, 383; *Peck v. Callaghan*, 95 N. Y. 73.



handwriting was in dispute. And this ruling was made notwithstanding a statute declaring that "every instrument in writing affecting real estate, which is acknowledged or proved and certified, may be read in evidence without further proof." The standard of comparison must be *proved* to be genuine. In the course of the opinion it is said: "The court is not prepared to adopt the suggestion that the standard writing may be proved by witnesses who have only seen the party write, for this is, in effect, fixing the standard by comparison; it is supporting a probability by a probability. Two obvious methods of proving the standard writing, are, *first*, by the testimony of a witness or witnesses who saw the party write it; and, *second*, by the party's admission when not offered by himself. We do not mean to say that these are the only methods, but only that the proof must be positive."<sup>1</sup>

The case above cited is thus criticised in the Supreme Court of New York: "An examination of the opinion in that case convinces us that it cannot be taken as a well-considered expression of the law. Doubt is therein expressed, whether a writing used for comparison can be proved by the testimony of witnesses, who have only seen the party write; if they have not seen him write that identical paper, and the court, in that case, does not appreciate the reason of the old rule (abolished by the statute under consideration) which forbade the introduction of writings, merely for the purpose of comparison."<sup>2</sup> And under later Iowa decisions a writing is admissible as a standard of comparison when the paper is conceded to be genuine, or is such that the other party is es-

<sup>1</sup> Hyde v. Woolfolk, 1 Iowa, 160.

<sup>2</sup> Hall v. Van Vranken, 28 Hun, 403, 406.

topped to deny it, or belongs to the witness, who was himself previously acquainted with the handwriting of the party, and exhibits the paper in confirmation and explanation of his testimony.<sup>1</sup> The writing to be used as the basis of comparison should be proved by direct and positive evidence.<sup>2</sup>

§ 133. **Comparison by Experts with Writings Admittedly Genuine.**—We pass on to consider the subject of a comparison of hands by experts in States where there is an absence of statutory provision regulating the matter and the subject is determined on common law principles. When the genuineness of a writing is in issue there seems to be no valid objection against allowing experts to examine and compare the writing in question with other writings, which are legally in evidence for some other purpose than that of being compared, and which are conceded to be in the handwriting of the person who is alleged to have written the writing in issue, or the genuineness of which he is estopped to deny. It is all but universally held that a comparison may be made of the writing in dispute with other writings of the same person already in evidence for another purpose, as well as with those which are admitted by the party himself to be genuine. Such writings seem to form an unobjectionable basis of comparison.

The genuineness of handwriting, whenever called in question by the one whose writing it purports to be, must of necessity be determined by comparison of some sort, or by testimony based on comparison. If the opinion of the genuineness of the writing is not based on a comparison of it with some other writing

<sup>1</sup> *Wilson v. Irish*, 62 Iowa, 260.

<sup>2</sup> *Winch v. Norman*, 65 Iowa, 186.

in juxtaposition, it must be based on the conception of the handwriting which the witness has retained in his mind. In most cases it is far more satisfactory to allow the witness to compare the writing in issue with other writings of unquestioned authenticity than it is to compel him to compare it with the standard which he may have formed and retained in his mind. The comparison with the former will ordinarily be more conducive to the ascertainment of the truth than will the latter. And if there is a science of handwriting then those who are experts therein should be allowed to express an opinion based on comparison of the disputed writing with others admitted to be genuine. The rulings in the different States where a comparison is allowed irrespective of any statutory provision will now be noticed.

In *Alabama* experts may institute comparisons between the disputed writing and those admitted to be genuine, but the courts will not permit extraneous papers to be presented before the jury or court, or shown to a witness, as a basis for comparison, though the same are admitted to be genuine.<sup>1</sup>

In *Arkansas* it seems that a comparison may be made with writings admitted to be genuine and already in the case.<sup>2</sup>

In *Colorado* comparison may be made with papers belonging to the files in the cause, or with those previously received in evidence and which are admitted to be genuine.<sup>3</sup>

<sup>1</sup> *Moon v. Crowder*, 72 Ala. 79, 88; *Bestor v. Roberts*, 58 Ala. 331; *Kirksey v. Kirksey*, 41 Ala. 626; *Bishop v. State*, 30 Ala. 40; *Crist v. State*, 21 Ala. 137.

<sup>2</sup> *Miller v. Jones*, 32 Ark. 338.

<sup>3</sup> *Wilber v. Eicholtz*, 5 Col. 240, 243.



In *Connecticut* a comparison may be made with writings admitted to be genuine.<sup>1</sup> And, as we shall see in a subsequent part of this chapter, the rule in this State allows comparison even with other writings.

In *Georgia* a comparison of writings is allowed.<sup>2</sup>

In *Indiana* experts may make a comparison with papers which "properly belong in the case, and which the party is therefore estopped from denying, and those that are admitted to be genuine."<sup>3</sup> That court also say: "In either case the signatures sought to be used in comparison, if not to papers in the cause, nor in evidence, must be admitted to be genuine, and the question arises who shall make the admission. The appellee insists that if the maker of the papers admit the signatures to them to be genuine, this is an admission within the meaning of the rule. We think otherwise. The admission must be made by the party against whom the paper is sought to be used, whether he is or is not the maker of the paper. A claim that a signature is genuine by a party who seeks to use it, is no admission at all."<sup>4</sup>

In *Kansas* a comparison can be made with writings already properly in evidence, or properly in the case for some other purpose, or with writings the genuineness of which are admitted, and where certain signatures are admitted by the party to be genuine they may be introduced in evidence for the

<sup>1</sup> *Tyler v. Todd*, 36 Conn. 218.

<sup>2</sup> *Boggus v. State*, 34 Ga. 275.

<sup>3</sup> *Hazzard v. Vickery*, 78 Ind. 64, 66. And see *Chance v. Indianapolis, etc. R. R. Co.*, 32 Ind. 473; *Burdick v. Hunt*, 43 Ind. 386; *Huston v. Schindler*, 46 Ind. 40; *Shorb v. Kinzie*, 80 Ind. 500; *Walker v. Steele*, 121 Ind. 436.

<sup>4</sup> *Shorb v. Kinzie*, 80 Ind. 500, 502.

mere purpose of comparison.<sup>1</sup> The comparison may be made both by experts and the jury.<sup>2</sup>

In *Maine* comparison of hands is allowed;<sup>3</sup> and, as will subsequently appear, the comparison is not restricted to writings already in the case, or which are admitted to be genuine.

In *Massachusetts* a comparison of handwriting has always been held proper.<sup>4</sup> In this State also, as will subsequently appear, the comparison is not restricted to papers in the case or admitted to be genuine.

In *Michigan* there are several cases in which it has been held that a comparison can be made by experts with papers already in the case.<sup>5</sup> And in a case decided in 1887, the court declared that "comparisons of this kind can only be made with such writings as are legally in evidence for some other purpose than that of being compared."<sup>6</sup> But in a recent case the court has held that when the plaintiff, whose signature is in dispute, is shown on cross-examination certain signatures which he admits to be in his handwriting, the signatures thus admitted by him to be genuine may be used for purposes of comparison.<sup>7</sup> The court considered this an exception to the general rule that comparison could only

<sup>1</sup> *Macomber v. Scott*, 10 Kan. 335. And see *Joseph v. Bank*, 17 Kan. 256; *Abbott v. Coleman*, 22 Kan. 250; *Ort v. Fowler*, 31 Kan. 478.

<sup>2</sup> *Abbott v. Coleman*, 22 Kan. 250, 253.

<sup>3</sup> *State v. Thompson*, 80 Me. 194; *Woodman v. Dana*, 52 Me. 9.

<sup>4</sup> *Hall v. Huse*, 10 Mass. 39; *Homer v. Wallis*, 11 Mass. 312; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *Cabot Bank v. Russell*, 4 Gray, 167; *Commonwealth v. Coe*, 115 Mass. 481; *Costello v. Crowell*, 133 Mass. 352; s. c., 139 Mass. 588.

<sup>5</sup> *Vinton v. Peck*, 14 Mich. 287, 294; *Worth v. McConnell*, 42 Mich. 475.

<sup>6</sup> *People v. Parker*, 67 Mich. 222, 224.

<sup>7</sup> *Dietz v. Nat. Bank*, 69 Mich. 287. See *Harvester Co. v. Miller*, 72 Mich. 265.

be had with papers legitimately in the cause for some other purpose. The court said: "It was open to the defense to use any reasonable test of cross-examination of his own acts, and if he admitted signatures which it was claimed were identical in character, that fact would be of great importance. He could not be taken by surprise by papers which he admitted to be genuine; and it is very manifest that such admitted signatures would form the best possible basis of comparison."

In *Minnesota* comparison may be made by experts not only with writings already in evidence for other purposes, but it may be made with other writings admitted to be genuine, although not in evidence for other purposes.<sup>1</sup>

In *Mississippi*<sup>2</sup> and *Missouri*<sup>3</sup> a like rule is recognized.

In the latter State it has been held, however, that an expert cannot express his opinion as to the genuineness of a note sued on by comparing it with the signature of the defendant in his plea of *non est factum*. The reason was that the defendant might have disguised his writing intentionally.<sup>4</sup>

In *New Hampshire* the comparison of hands is allowed, and as we shall see subsequently, is not restricted to papers already in evidence for another purpose, or to those conceded to be genuine.<sup>5</sup>

In *New York*, prior to the enactment of the statute already referred to, it was held to be competent

<sup>1</sup> *Morrison v. Porter*, 35 Minn. 425.

<sup>2</sup> *Wilson v. Beauchamp*, 50 Miss. 24.

<sup>3</sup> *State v. Scott*, 45 Mo. 302; *State v. Clinton*, '67 Mo. 380; *Springer v. Hall*, 83 Mo. 693; *Rose v. First Nat. Bank*, 91 Mo. 399.

<sup>4</sup> *Springer v. Hall*, 83 Mo. 693, 697.

<sup>5</sup> *State v. Hastings*, 53 N. H. 452; *Bowman v. Sanborn*, 25 N. H. 110; *Reed v. Spaulding*, 42 N. H. 111, 121; *State v. Shinborn*, 46 N. H. 497.



to allow comparison to be made by experts with other specimens of the party's handwriting, which had been admitted in evidence for other lawful purposes on the trial, but not competent to introduce such specimens for the sole purpose of comparison.<sup>1</sup> And in a recent case in that State where the defendants offered to show by expert testimony, that the note in question and a letter admitted by the plaintiff to be in her handwriting were both in the same handwriting, the court held it to be inadmissible. It said: "Comparison of handwriting is only admissible between the disputed writing in question and the genuine handwriting of the person purporting to be the writer of the disputed writing."<sup>2</sup>

In *North Carolina* an expert has been allowed to make a comparison of the disputed signature with a deposition already in evidence,<sup>3</sup> but the courts of this State will not allow a comparison of hands to be made by the jury.<sup>4</sup>

In *Ohio* a comparison of hands is allowed, and is not restricted to papers already in evidence or conceded to be genuine.<sup>5</sup>

In *South Carolina* a somewhat peculiar doctrine prevails as to a comparison of hands, and the doctrine of that State on the subject is subsequently considered.<sup>6</sup>

In *Texas* we have seen that the statutes make pro-

<sup>1</sup> *Miles v. Loomis*, 75 N. Y. 288; *Peck v. Callahan*, 95 N. Y. 73, 75.

<sup>2</sup> *Bruyn v. Russell*, 52 Hun, 17, 21.

<sup>3</sup> *Yates v. Yates*, 76 N. C. 142.

<sup>4</sup> *Fuller v. Fox*, 101 N. C. 119; *Tuttle v. Rainey*, 98 N. C. 513; *Burton v. Wilkes*, 66 N. C. 604; *Watson v. Davis*, 7 Jones, 178; *Otey v. Hoyt*, 3 Jones, 407; *Outlaw v. Hurdle*, 1 Jones, 150; *Pope v. Askew*, 1 Ired. 16.

<sup>5</sup> *Calkins v. State*, 14 Ohio St. 222; *Hicks v. Person*, 19 Ohio, 427; *Koons v. State*, 36 Ohio St. 195.

<sup>6</sup> See section 135.

vision for a comparison of hands in criminal cases, but the provision does not extend to civil cases. The courts of the State hold, however, that in civil cases a comparison may be made by experts with papers already in the case and admitted to be genuine, or with those the genuineness of which the party is estopped to deny.<sup>1</sup>

In *Vermont* a comparison of hands is allowed, and is not restricted to papers already in evidence, or admitted to be genuine.<sup>2</sup> And such is the rule in *Virginia*.<sup>3</sup>

In the *Federal Courts* a comparison of hands is allowed to be made. The leading case in the Supreme Court of the United States is that of *Strother v. Lucas*,<sup>4</sup> in which the general rule was stated to be "that evidence by comparison of hands is not admissible, when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands." But the Supreme Court in *Moore v. United States*,<sup>5</sup> and in *Williams v. Conger*<sup>6</sup> recognize the principle that a comparison can be made in cases where the paper used as a standard is admitted to be in the handwriting of the party, or where he is estopped from denying it to be so.

§ 134. **Comparison by Experts of Writings in Juxtaposition Not Allowed in Some States.**—We have seen in the preceding section that a comparison of the

<sup>1</sup> *Kennedy v. Upshaw*, 64 Tex. 412; *Smyth v. Caswell*, 67 Tex. 573; *Wagoner v. Ruply*, 69 Tex. 700.

<sup>2</sup> *Rowell v. Fuller*, 59 Vt. 688. And see *Sanderson v. Osgood*, 52 Vt. 309.

<sup>3</sup> *Hanriot v. Sherwood*, 82 Va. 1.

<sup>4</sup> 6 Pet. 763 (1832).

<sup>5</sup> 91 U. S. 270, (1875).

<sup>6</sup> 125 U. S. 397, 414, (1887).

writing in question with other writings already in the case, or admitted to be genuine, is generally recognized in the courts of this country. But in a few States a comparison of writings in juxtaposition cannot be made by experts, opinions based on such a comparison by them being rigidly excluded. Such a principle is recognized in the courts of Pennsylvania. The language of that court on this general subject is as follows :

“ 1st. That evidence touching the genuineness of a paper in suit may be corroborated by a comparison, to be made by the jury, between that paper and other well authenticated writings of the same party.

“ 2d. But mere experts are not admissible to make the comparison, and to testify their conclusions from it.

“ 3d. That witnesses having knowledge of the party's handwriting are competent to testify as to the paper in suit ; but they, no more than experts, are to make comparison of hands, for that were to withdraw from the jury a duty which belongs appropriately to them.

“ 4th. The test documents to be compared should be established by the most satisfactory evidence before being admitted to the jury.

“ 5th. That experts may be examined to prove forgery or simulated writings, and to give the conclusions of skill in such cases as have been mentioned, and their like.”<sup>1</sup>

In Tennessee the courts appear to have gone even further and to have held that a comparison will not be permitted to be made either by jury or witnesses.<sup>2</sup>

<sup>1</sup> *Travis v. Brown*, 43 Pa. St. 9, 17, 18. And see *Foster v. Collner*, 107 Pa. St. 305; *Berryhill v. Kirchner*, 96 Pa. St. 489.

<sup>2</sup> *Clark v. Rhodes*, 2 Heisk. 206.



In Kentucky a comparison by the jury, with or without the aid of experts, is not recognized.<sup>1</sup> The Court of Appeals in the case last cited make the following comment on the rule adopted in that State : " In view of the necessarily uncertain character of such expert testimony, and the fact that as the media of evidence are multiplied the chances of mistake are increased, we regard this as the correct rule ; but we must not be understood as holding that an expert may not testify as to differences in the letters or words, or speak of other facts as they appear to him upon the face of the writing."

In Illinois the genuineness of a signature cannot be proved or disproved by comparing it with another signature admitted to be genuine.<sup>2</sup> It has, however, been held in that State that, on cross-examination, where the object is not to prove a signature by comparison, but simply to tell the accuracy of the observation and memory of the witness, it is competent to show him a signature as to the genuineness of which there is no question, and examine him in respect to the genuineness of such signature.<sup>3</sup>

In Maryland a comparison of hands is not allowed.<sup>4</sup> In a recent case in that State, where witnesses who had frequently seen the person write

<sup>1</sup> *Fee v. Taylor*, 83 Ky. 259, 263 (1885).

<sup>2</sup> *Jumpertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209; *Melvin v. Hodges*, 71 Ill. 422; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327, 332; *Snow v. Wiggin*, 19 Ill. App. 542; *Gitchell v. Ryan*, 24 App. Ct. 375. In *Brobston v. Cahill*, 64 Ill. 358, the court undertakes to distinguish *Jumpertz v. People*, *supra*, and to hold that comparison can be made with genuine writings already in the case for another purpose. But in *Jumpertz v. People* and in other cases the papers sought to be used as a standard were already in the case for other purposes.

<sup>3</sup> *Melvin v. Hodges*, 71 Ill. 422; *Gitchell v. Ryan*, 24 App. Ct. 375.

<sup>4</sup> *Smith v. Walton*, 8 Gill, 86; *Niller v. Johnson*, 27 Md. 6; *Tome v. Parkersburg, etc. R. R. Co.*, 39 Md. 36, 90; *Herrick v. Swomley*, 56 Md. 440.

were testifying, it was held that, on cross-examination, counsel, for the purpose of refreshing their memories, might exhibit to them certain signatures, which the party admitted he had written, and ask them whether after examining such signatures they were still of the opinion that the signature was not genuine. This the court said was no infringement of the rule against comparison of hands.<sup>1</sup>

And in New Jersey and Rhode Island, prior to the enactment of the statutory provisions already set forth allowing a comparison to be made, their courts held a comparison of writings placed in juxtaposition to be improper.<sup>2</sup>

§ 135. **Comparison in Doubtful Cases — The Intermediate Theory of the South Carolina Courts.**— Between the cases which allow a comparison to be made with writings either admitted or proven genuine, and those which deny in any case the right to make a comparison, stands what in South Carolina the courts have called a “medium” doctrine. The rule in that State is that when it is necessary to prove the authenticity of a writing it may be done by the testimony of one who was present and saw the writing executed, or by the testimony of those who are acquainted with the writing of the party in question, but a comparison of writings in juxtaposition is not in the first instance allowed. If, however, the proof adduced leaves the question of authenticity doubtful, then proof by comparison will be allowed. The question whether the evidence is so doubtful as to admit this supplemental testimony must be determined in the first instance by the presiding judge, but the question is not entirely of dis-

<sup>1</sup> *National Bank v. Armstrong*, 66 Md. 113, 116.

<sup>2</sup> *West v. State*, 22 N. J. Law, 241, 242; *Kinney v. Flynn*, 2 R. I. 319.

cretion with him, his decision being subject to review in the appellate court. In the language of that court, however, "the case should be a very strong one and the error of the judge very patent," to warrant the court in overruling his judgment.<sup>1</sup> This doctrine seems peculiar to that State.

§ 136. **The Right of Comparison with Writings Proven Genuine for the Purpose—Denied.**—The decided weight of authority in this country establishes the principle that a comparison of handwriting by the juxtaposition of irrelevant writings with the one in issue is not permissible in cases where the irrelevant writing is not admitted to be genuine. A writing, otherwise irrelevant, cannot, according to the weight of authority, and in the absence of a statute providing otherwise, be proven genuine simply for purposes of comparison.

The objections to the introduction of specimens of handwriting not admitted to be genuine and not otherwise in the case, are succinctly stated by the Supreme Court of Kansas, and may be repeated here in this connection: "The principal, if not the only objections urged against this kind of evidence are as follows: 1st. The writings offered in evidence as specimens may be manufactured for the occasion. 2d. Fraud may be practiced in the selection of the writings. 3d. The other party may be surprised; he may not know what documents are to be produced, and therefore he may not be prepared to meet the inferences sought to be drawn from them. 4th. The handwriting of a person may be changed by age, health, habits, state of mind, position, haste, penmanship, and writing materials. 5th. The genu-

<sup>1</sup> *Benedict v. Flanigan*, 18 S. C. 506. And see *Bowman v. Plunkett*, 2 McC. 518; *Bird v. Millar*, 1 McM. 125; *Bennett v. Matthews*, 5 S. C. 478.



ineness of the specimens of handwriting offered in evidence may be contested, and others successively introduced, to the infinite multiplication of collateral issues, and the subversion of justice. 6th. Juries are too illiterate, and are not competent to judge of this kind of evidence."<sup>1</sup>

The cases in which it has been held that such a comparison is not allowable may be found in the note below.<sup>2</sup>

<sup>1</sup> *Macomber v. Scott*, 10 Kan. 339. See, too, *Miles v. Loomis*, 75 N. Y. 288, 296.

<sup>2</sup> *Alabama*.—*Snider v. Burks*, 84 Ala. 53; *Morris v. Crowder*, 72 Ala. 79; *Kirksey v. Kirksey*, 41 Ala. 626. And see *Little v. Beazley*, 2 Ala. 210; *State v. Givens*, 5 Ala. 750; *Bishop v. State*, 30 Ala. 40; *Bestor v. Roberts*, 58 Ala. 331.

*Arkansas*.—In *Miller v. Jones*, 32 Ark. 338, it was decided that papers not already in evidence could not be laid before the jury for purposes of comparison.

*Georgia*.—*Boggins v. State*, 34 Ga. 278; *Henderson v. Hackney*, 16 Ga. 525. But in this State such a comparison is now authorized by statutory provision.

*Illinois*.—*Snow v. Wiggin*, 19 Ill. App. 542; *Gitchell v. Ryan*, 24 Ill. App. 372; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327; *Brobston v. Cahill*, 64 Ill. 356; *Jumpertz v. People*, 21 Ill. 414; *Kernin v. Hill*, 37 Ill. 109.

*Indiana*.—Comparison can be made only with papers otherwise in evidence in the case or admitted to be genuine. *Hazzard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 80 Ind. 500.

*Kentucky*.—*Woodward v. Spiller*, 1 Dana, 180; *Bannister v. Weatherford*, 7 B. Mon. 269; *Hawkins v. Grimes*, 13 B. Mon. 260; *Northern Bank v. Buford*, 1 Duval, 335.

*Maryland*.—*Herrick v. Swomley*, 56 Md. 439; *Tome v. Parkersburg*, etc. R. R. Co., 39 Md. 93; *Armstrong v. Thurston*, 11 Md. 148; *Miller v. Johnson*, 27 Md. 6.

*Michigan*.—*Dietz v. Fourth National Bank*, 69 Mich. 288; *People v. Parker*, 67 Mich. 224; *Matter of Foster's Will*, 34 Mich. 21; *Howard v. Patrick*, 43 Mich. 122; *Worth v. McConnell*, 42 Mich. 473; *First National Bank of Houghton v. Robert*, 41 Mich. 709; *Van Sickle v. People*, 29 Mich. 64; *Vinton v. Peck*, 14 Mich. 287.

*Missouri*.—*Rose v. First Nat. Bank of Springfield*, 91 Mo. 399; *State v. Clinton*, 67 Mo. 380; *State v. Scott*, 45 Mo. 302; *Dow v. Spenny*, 29 Mo. 387; *State v. Tompkins*, 71 Mo. 452; *Corby v. Weddle*, 57 Mo. 422; *Springer v. Hall*, 83 Mo. 693, 697.

*New Jersey*.—By statute comparison of hands with writings proved genuine is now allowed in this State, but prior to the enactment of the

§ 137. **The Right of Comparison with Writings Proven Genuine for the Purpose—Affirmed.**—In a few States, however, the courts, irrespective of any statutory provision authorizing it, have allowed a comparison to be made between the writing in issue and others proved on the trial to be genuine for the express purpose of comparison. They have not restricted the right of comparison to writings already in the case for another purpose, nor to those conceded to be genuine.<sup>1</sup>

statute the rulings of the court were against a comparison of hands. *West v. State*, 22 N. J. Law, 212.

*New York.*—In this State also a comparison of hands with writings proved genuine is now allowed by statute, but before the enactment of the statute this was not allowed. *Hynes v. McDermott*, 82 N. Y. 41; *Randolph v. Laughlin*, 48 N. Y. 457; *Pontius v. People*, 82 N. Y. 349; *Dubois v. Baker*, 30 N. Y. 355; *Van Wyck v. McIntosh*, 14 N. Y. 439.

*Pennsylvania.*—Comparison by experts is not allowed. *Foster v. Collner*, 107 Pa. St. 395; *Berryhill v. Kirchner*, 96 Pa. St. 489; *Travis v. Brown*, 43 Pa. St. 12; *Aumick v. Mitchell*, 82 Pa. St. 211; *Haycock v. Greup*, 57 Pa. St. 438.

*Rhode Island.*—*Kinney v. Flynn*, 2 R. I. 319.

*Tennessee.*—*Fogg v. Dennis*, 3 Humph. 47; *Kannon v. Galloway*, 2 Baxter, 231; *Wright v. Hessey*, 3 Baxter, 42; *Clark v. Rhodes*, 2 Heisk. 206.

*Wisconsin.*—By statute comparison of hands with writings proved genuine is now allowed in this State, but prior to the enactment of the statute the decisions of the courts were against a comparison of hands. *Hazelton v. Union Bank*, 32 Wis. 47; *Pierce v. Northey*, 14 Wis. 9.

*Federal Courts.*—*Moore v. United States*, 91 U. S. 271; *United States v. Chamberlain*, 12 Blatchf. 390; *United States v. McMillen*, 29 Fed. Rep. 247.

<sup>1</sup> *Connecticut.*—In *Tyler v. Todd*, 36 Conn. 223, the court say: "In this State we allow the disputed signature to be compared with signatures admitted or proved to be genuine. The triers may compare and judge for themselves, and experts may, upon comparison, give their opinion. But the signature used as a standard of comparison must not only be genuine, but must be admitted or proved to be such before it can be used." And see *Lyman*, 9 Conn. 56.

*Massachusetts.*—*Costello v. Crowell*, 133 Mass. 352; *Richardson v. Newcomb*, 26 Pick. 317; *Moody v. Rowell*, 17 Pick. 490; *Homer v. Wallis*, 11 Mass. 309.

*Maine.*—*Sweetser v. Lowell*, 33 Me. 446; *Woodman v. Dana*, 52 Me. 9.

*Mississippi.*—*Wilson v. Beauchamp*, 50 Miss. 24; *Garvin v. State*, 52 Miss. 209.

And in some States it is now expressly provided by statutes that a comparison of a disputed writing with any writing proved to be genuine shall be permitted to be made. It is so provided in California,<sup>1</sup> Georgia,<sup>2</sup> Iowa,<sup>3</sup> Nebraska,<sup>4</sup> New Jersey,<sup>5</sup> New York,<sup>6</sup> Rhode Island,<sup>7</sup> and Wisconsin.<sup>8</sup>

§ 138. **Mode of Proof When Comparison is Allowed with Writing Proven Genuine for the Purpose.**—In the English statute it is expressly provided that the writing offered as a standard, if not admitted to be genuine, must be proved genuine to the satisfaction of the court. And so it is provided in the statute of California, of New Jersey, of New York and of Rhode Island. But the statutes of the other States contain no such provision. The question is then presented whether in such cases the proof of the genuineness of the instrument is addressed to the court or the jury. In New Hampshire the question rests solely with the jury, and if they determine that the proof is insufficient, it becomes their duty to lay the writing, and all the evidence of the experts based on its genuineness entirely out of the case.<sup>9</sup> But elsewhere the courts have as a rule

*New Hampshire.*—State v. Hastings, 53 N. H. 460.

*Ohio.*—Bell v. Brewster, 44 Ohio St. 690; Bragg v. Colwell, 19 Ohio St. 407; Koons v. State, 36 Ohio St. 198; Pavey v. Pavey, 36 Ohio St. 600.

*Vermont.*—Adams v. Field, 21 Vt. 256; State v. Ward, 39 Vt. 225. Rowell v. Fuller, 59 Vt. 688.

*Virginia.*—Hanriott v. Sherwood, 82 Va. 1.

<sup>1</sup> Code of Civil Procedure, § 1943.

<sup>2</sup> Code, § 3840 (3787).

<sup>3</sup> McClain's Ann. Code, § 4905.

<sup>4</sup> Compiled Statutes (1881), p. 576, § 344.

<sup>5</sup> Rev. Stat., § 19, p. 381.

<sup>6</sup> Laws of 1880, ch. 36, p. 141.

<sup>7</sup> Public Statutes (1882), p. 588, § 42.

<sup>8</sup> Sanborn & Berryman Ann. Stat. § 4187.

<sup>9</sup> State v. Hastings, 53 N. H. 452, 461.



held such proof to be addressed to the court,<sup>1</sup> and the decision of the trial judge on the question of the admissibility of the writing as a standard seems to be final if there is any proper evidence to support it.<sup>2</sup> In Vermont it was at one time held that the fact that the court has adjudged the papers genuine does not debar the jury from ultimately determining the question for themselves.<sup>3</sup> But a later case seems to adopt the contrary principle.<sup>4</sup>

The general rule moreover is that the proof of the genuineness of the instrument thus offered must be positive. It should be proved either by the admission of the party when the standard is not offered by himself, or else by the testimony of persons who testify directly and positively to having seen the party write the paper.<sup>5</sup> This was the rule, too, in the English ecclesiastical courts, where the maxim was: *Testis qui poterint deponere, quod viderunt testatorem subscribentem hujus modi scriptis*, etc.<sup>6</sup>

As the Supreme Court of Massachusetts has expressed it; the genuineness of a writing, to be used as a standard of comparison, "must be shown beyond a doubt."<sup>7</sup>

<sup>1</sup> Bragg v. Colwell, 19 Ohio St. 412; State v. Ward, 39 Vt. 225; Rowell v. Fuller, 59 Vt. 688.

<sup>2</sup> State v. Thompson, 80 Me. 194; Commonwealth v. Coe, 115 Mass. 504; Costello v. Crowell, 133 Mass. 352; Costello v. Crowell, 139 Mass. 590; Nunes v. Perry, 113 Mass. 276.

<sup>3</sup> State v. Ward, 39 Vt. 225.

<sup>4</sup> Rowell v. Fuller, 59 Vt. 688.

<sup>5</sup> Hyde v. Woolfok, 1 Iowa, 159; Pavey v. Pavey, 30 Ohio St. 600; Calkins v. State, 14 Ohio St. 222, 228; Bragg v. Colwell, 19 Ohio, 412; Eborn v. Zimpleman, 47 Tex. 503, 518; Koons v. State, 36 Ohio St. 195, 199; Cohen v. Teller, 93 Pa. St. 123, 128.

<sup>6</sup> Oughton's Ordo Judiciorum, tit. 225; De Comparatione Litterarum, § 3; Beaumont v. Perkins, 1 Phillimore, 78.

<sup>7</sup> Martin v. Maguire, 7 Gray, 177. And see Baker v. Haines, 6 Whar-  
ton (Pa.), 291; De Pue v. Place, 7 Pa. St. 429.

And the court in the case last cited held that it could not be shown by producing a paper which had been witnessed, and then proving the handwriting of the subscribing witness, upon due proof being made that such witness resided out of the State. So the same court in a subsequent case has held that letters received from the testator in answer to letters to him could not be received as standards.<sup>1</sup> Where a receipt was offered as a standard, and the witness testified that the defendant gave him a receipt that looked very similar to the one offered, but could not positively say that it was the identical one, the Supreme Court of Ohio held the proof too uncertain to admit of the reception of the paper.<sup>2</sup>

§ 139. **Expert should have before Him in Court the Writings Compared.**—The rule is that an expert in handwriting, when speaking as a witness only from a comparison, should have before him in court the writings compared.<sup>3</sup> The reason being that their presence is essential to an intelligent examination in chief, as well as to an intelligent cross-examination; nor can there be any fair means of meeting the testimony of the witness by that of other witnesses, unless the writings upon which the opinion of the expert is based are in court to be presented to other experts for their opinion. But where the original writing is lost, and the loss has been clearly proved, the opinion of an expert has been received as to the genuineness of the signature to the lost instrument, he having examined the signature prior to its loss, and compared his recollection of such signature with

<sup>1</sup> *McKeone v. Barnes*, 108 Mass. 344.

<sup>2</sup> *Pavey v. Pavey*, 30 Ohio St. 600.

<sup>3</sup> *Haynes v. McDermott*, 82 N. Y. 41; *Woodman v. Dana*, 52 Me. 9; *Spottiswood v. Weir*, 66 Cal. 525, 529.

the admitted genuine signature of the same person, on papers already in the case.<sup>1</sup> And an expert has been allowed to testify that entries upon hotel registers, which he had seen and examined, were in the handwriting of the person who wrote certain other signatures, which were produced and proved or admitted to be genuine, although the entries were not before the jury, the registers having been destroyed by the person whose signature was in question, for the purpose of suppressing the evidence.<sup>2</sup> So where the State, upon an indictment for forgery, was unable to produce the check alleged to have been forged by the prisoner, an expert, called by the State, and who had seen the alleged forged check several months previously, was permitted to testify as to the genuineness of the signature, a genuine signature of the accused having been shown on the trial.<sup>3</sup>

§ 140. **Comparison with Photographic Copies.**—It is well settled that for certain purposes photographs may be received in evidence. Thus, whenever it is important that the *locus in quo* should be described to the jury, it is competent to introduce in evidence a photographic view of it.<sup>4</sup> And in cases where questions relating to the identity of persons have been raised, photographs have likewise been held admissible.<sup>5</sup>

So in an action to recover damages for assault and

<sup>1</sup> *Abbott v. Coleman*, 21 Kan. 250; *Koons v. State*, 36 Ohio St. 195.

<sup>2</sup> *State v. Shinborn*, 46 N. H. 497.

<sup>3</sup> *Koons v. State*, 36 Ohio St. 195.

<sup>4</sup> *Barker v. Perry*, 67 Iowa, 146; *Locker v. Sioux City, etc. R. R. Co.*, 46 Iowa, 109; *Dyson v. N. Y., etc. R. R. Co.*, 57 Conn. 9; *Bliss v. Johnson*, 76 Cal. 597; *People v. Buddensieck*, 103 N. Y. 487; *Church v. City of Milwaukee*, 31 Wis. 513; *Randall v. Chase*, 133 Mass. 210. See *People's, etc. R. R. Co. v. Green*, 56 Md. 84, 94.

<sup>5</sup> *Brooke v. Brooke*, 60 Md. 529; *Udderzook v. Commonwealth*, 76 Pa. St. 340; *Marion v. State*, 20 Neb. 233; *Ruloff v. People*, 45 N. Y. 213.



battery committed with a rawhide the plaintiff has been allowed to introduce a ferrotype of his back taken three days after the injury, the person taking the same having testified that it was a correct representation.<sup>1</sup>

The question arises whether this principle is extended to the admission of photographic copies of writings so that they may be used for the purpose of a comparison of hands. That they may be used under certain circumstances will appear as we proceed.

1. It will be observed, however, that photographic copies, like all other copies, are merely secondary evidence, and cannot be used as equivalent to primary evidence. Thus, in a case in Texas, where an attempt was made to introduce in evidence the opinion of a witness, living in another State, as to the genuineness of a disputed handwriting, the opinion being based on a photographic copy of the instrument in dispute attached to the interrogatories, in support of the admissibility of the evidence it was urged that the court should take judicial notice that the photographic process secured a mathematically exact reproduction of the original, and that, therefore, evidence as to the handwriting of such a copy was as satisfactory as though it referred to the original. The conclusion reached by the court was that photographic copies of instruments sued on could only be used as secondary evidence, and rejected the testimony on the ground that no foundation had been laid for it.<sup>2</sup>

The Supreme Court of Michigan, speaking of this

<sup>1</sup> Reddin v. Gates, 52 Iowa, 210.

<sup>2</sup> Eborn v. Zimpelman, 47 Tex. 503.

kind of evidence in the *Matter of Alfred Foster's Will*,<sup>1</sup> decided in 1876, said: "If the court had permitted photographic copies of the will to be given to the jury with such precautions as to secure their identity and correctness, it might not, perhaps, have been error. Nevertheless, it is not always true that every photographic copy would be safe on any inquiry requiring minute accuracy. Few copies can be so satisfactory as a good photograph, but all artists are not competent to make such pictures on a large scale, and all photographs are not absolutely faithful resemblances. It is quite possible to tamper with them, and an impression which is at all blurred would be very apt to mislead on questions of handwriting where forgery is claimed. Whether it would or would not be permissible to allow such documents to be used their use can never be compulsory. The original, and not the copy, is what the jury must act upon, and no device can be properly allowed to supersede it. Copies of any kind are merely secondary evidence, and in this case they were intended to be used as equivalent to primary evidence in determining the genuineness of the primary document." And in a subsequent case in the same court this ruling was adhered to and photographic copies were held inadmissible, the court saying: "No authority seems to justify the proof of the handwriting of obtainable originals by any species of imitation or copy,"<sup>2</sup>

In a case where the original papers were on file in the War Department, and could not be removed without public detriment and inconvenience, Mr. Justice BRADLEY held that photographic copies could

<sup>1</sup> 34 Mich. 23.

<sup>2</sup> Maclean v. Scripps, 52 Mich. 214, 219.

be received as being the best evidence that the case admitted of.<sup>1</sup>

The right to make a comparison with photographic copies of handwriting has been denied in Maryland,<sup>2</sup> but the force of the case, as an authority on the point we are considering, is destroyed by the fact that a comparison of hands is not permitted in that State, the old English rule being still adhered to.

2. But when the use of photographic copies is not objectionable as being an attempt improperly to use secondary evidence as equivalent to primary evidence, magnified photographic copies of the writing in dispute and of admitted genuine writings of the same person have been received in evidence, competent preliminary proof having been made that the copies were accurate in all respects, except as to size and coloring.<sup>3</sup> In the case cited above it is said: "They (the photographic copies) were capable of affording some aid in comparing and examining the different specimens of handwriting which were exhibited on trial. It is not dissimilar to the examination with a magnifying glass. Proportions are so enlarged thereby to the vision that faint lines and marks, as well as the genuine characteristics of handwriting, which perhaps could not otherwise be clearly discerned and appreciated, are thus disclosed to observation and afford additional and useful means of making comparisons between admitted signatures and one which is alleged to be only an imitation. Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies pro-

<sup>1</sup> *Leathers v. Salver Wrecking Co.*, 2 Wood, 680, 682.

<sup>2</sup> *Miller v. Johnson*, 27 Md. 36; *Tome v. Parkersburg*, 39 Md. 36.

<sup>3</sup> *Marcy v. Barnes*, 16 Gray, 160.



duced by the art of the photographer, we are unable to perceive any valid objections to the use of such proposed representations of original and genuine signatures as evidence competent to be considered and weighed by a jury."

3. The right to permit such a comparison to be made is denied, however, in cases where no proof has been made as to the manner and exactness of the photographic method used.<sup>1</sup> In so ruling the New York court say: "We may recognize that the photographic process is ruled by general laws that are uniform in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment; and still more, that the thing itself should be at hand, to be put under the eye of other witnesses for the trial upon it of their skill. The certainty of expert testimony in these cases is not so well assured as that we can afford to let in the errors or differences in copying, though it be done by howsoever a scientific process." The objections to the use of photographic copies in such cases were very ably stated in a decision excluding the opinions based on such evidence, in a case decided some ten years before in the Surrogate's Court in the county of New York. It was said that such evidence would

<sup>1</sup> Hynes v. McDermott, 82 N. Y. 41.

raise many collateral issues, as, for instance, the correctness of the lens, the state of the weather, the skill of the operator, the color of the impression, the purity of the chemicals, the accuracy of the focusing, the angle at which the original to be copied was inclined to the sensitive plate, etc. "When we reflect that by placing the original to be copied obliquely to the sensitive plate, the portion nearest to the plate may be distorted by being enlarged, and that the portion furthest from the plate must be correspondingly decreased, whilst the slightest bulging of the paper upon which the signature be printed may make a part blurred and not sharply defined, we can form some idea of the fallacies to which this subject is liable. \* \* \* In what manner can photography make the signature, in any practical sense, more apparent to the observer than the signature itself? The operator may, moreover, through fraud or skill, make some particular lines in the reproduced signature stand forth more prominently than in the original signature. If the photograph be an absolutely perfect reproduction of the original signature—the former being the same as the latter—there can be no necessity for the study of the reproduction. If, through the fraud or skill of the operator, some lines be brought out with undue prominence, then it should not be considered proper evidence on which to base an opinion, for it is not a correct reproduction."<sup>1</sup>

§ 141. **Comparison with Letterpress Copies.**—As a rule comparison with letter press copies is not allowed. A comparison of writings should be made with originals if possible, and copies produced by a

<sup>1</sup> Taylor Will Case, 10 Abb. Pr. (N. S.) 300.

press or by a machine, however exact they may be, are not regarded as originals. And the right to make use of such copies for purposes of comparison has been denied on that ground.<sup>1</sup>

In a case in California it has been held not only that a press copy of a writing is inadmissible until the non-production of the original has been accounted for, but that an expert cannot testify as to the genuineness of a disputed writing upon a comparison of a genuine writing with a press copy of the writing when its genuineness is disputed. The court say: "This was not permissible under any rule with which we are acquainted. \* \* \* It would be adding vastly to the danger of such evidence, to permit evidence to be given from a comparison of genuine writings with a press copy of the writing whose genuineness is disputed. Indeed, in this very case the expert, on cross-examination, testified 'that it would be very dangerous to decide on a press copy for sure.'"<sup>2</sup> The Supreme Court of Pennsylvania has likewise held that letterpress copies cannot be used for the purpose of a comparison. That court says: "Here there was merely a copy—a press copy, it is true—of the nature of a *fac-simile*, but not necessarily exact, as the spreading of the ink in such copies often obliterates the fine lines of a handwriting, though substantially preserving its original form. It is manifest such copies would be an unsafe standard. I know of no authority for their introduction, and upon principle they are inadmissible."<sup>3</sup>

§ 142. **Comparison with Writings made on the Trial.**—A party cannot be compelled, on cross-exam-

<sup>1</sup> Commonwealth v. Eastman, 1 Cush. 189, 207.

<sup>2</sup> Spottiswood v. Weir, 66 Cal. 525.

<sup>3</sup> Cohen v. Teller, 93 Pa. St. 123.



ination, to write his name in court for the purpose of having it compared with the disputed writing.<sup>1</sup> But if he writes his name as requested, it has been held that it may be used as a standard of comparison, for the purpose of contradicting him.<sup>2</sup> Hence, in a recent case in Nebraska, where the defendant denied the genuineness of a promissory note, and called his son as a witness, who testified in chief that certain words in the note which his father actually gave were written by himself, and on cross-examination was requested to write the same words in the presence of the jury, it was held that such writing could be used for purposes of comparison, the party conducting the examination taking the risk whether the writing was dissimilar or not.<sup>3</sup> But a party is not entitled to write his signature in the presence of the jury for purposes of comparison with a signature purporting to be his, the genuineness of which he denies.<sup>4</sup> There are cases, however, which show that presiding judges in their discretion have ordered or allowed signatures to be written in the presence of the jury and to be considered by them.<sup>5</sup> But we are not aware of any case which asserts that a presiding judge is required by law to allow this to be done. He may refuse to permit it to be done when the circumstances are such that it does not appear to furnish a fair standard of comparison.<sup>6</sup> And in a

<sup>1</sup> *First National Bank of Houghton v. Robert*, 41 Mich. 709; *Gilbert v. Simpson*, 6 Daly (N. Y.), 30.

<sup>2</sup> *Cobbett v. Kilminster*, 4 Fos. & Fin. 490; *Doe v. Wilson*, 10 Moore, P. C. 502, 530; *Chandler v. LeBarron*, 45 Me. 534.

<sup>3</sup> *Huff v. Nims*, 11 Neb. 364.

<sup>4</sup> *King v. Donahue*, 110 Mass. 155; *United States v. Jones*, 10 Fed. Rep. 469.

<sup>5</sup> *Osborne v. Hosier*, 6 Mod. 167; *Williams' Case*, 1 Lewin, 137; *Regina v. Taylor*, 6 Cox C. C. 58.

<sup>6</sup> *Commonwealth v. Allen*, 128 Mass. 46, 50.

case in Alabama it has been held error to permit a witness, who confesses to have written the forged instrument under the direction and request of the prisoner, to write a similar instrument in the presence of the court and jury, for the purpose of comparison.<sup>1</sup>

§ 143. **Writings Admissible for Comparison in Orthography.** — Although prior to the act of 1854 writings could not be introduced in evidence in the English courts, for the purpose of showing a similarity in the formation of letters, or figures and modes of writing, yet it was held they could be introduced for the purpose of proving a particular mode of spelling. For such a purpose specimens of the party's handwriting containing that particular orthography were admissible.<sup>2</sup> A peculiar case of this kind occurred at the Greenwich County Court. The party denied most positively that a certain receipt was in his handwriting. It read, "Received the Hole of the above." He was asked to write a sentence containing the word "whole." He took pains to disguise his hand, but adopted the above phonetic style of spelling, even retaining the capital H.<sup>3</sup> But in Wisconsin the preceding cases not having been brought to the attention of the court, a different view seems to have been taken of the subject. In that case, which was an indictment for arson, the prosecution desired to show that a letter, containing threats of arson, was written by the prisoner. It contained words of a peculiar form, style and orthography, and was repeated to him orally and verbally by the police officers at the station, who re-

<sup>1</sup> Williams v. State, 61 Ala. 33.

<sup>2</sup> Brookes v. Tichborne, 5 Exch. 929.

<sup>3</sup> Taylor on Evidence, 1552, note a.

requested him to write as they read. The copy thus made was found to be an exact *fac-simile* of the original in the peculiarities above noted. The court excluded it on the ground that a comparison of hands was not allowable. The letter, however, might, perhaps, have been inadmissible on other grounds, as that it was compelling the prisoner to give evidence against himself; but this was not referred to by the court.

§ 144. **Comparison of Writings.—The Rule on Cross-Examination as to Fictitious Specimens.**—The question has been raised whether it is competent on cross-examination to test the knowledge of the witness by showing him real and fictitious signatures and asking him to say which of them are genuine. In those States where a comparison is only allowed to be made with writings which are admitted to be genuine, it is evident that such a comparison should not be allowed except both parties are agreed which of the signatures are real and which false, for unless so agreed side issues are raised which complicate the case.<sup>1</sup> The rule which excludes writings not admittedly genuine applies with as much force to the cross-examination as to the direct examination. To admit such writings would lead, as well in the one case as in the other, to an indefinite number of collateral issues, and would operate as a surprise to the opposite party who would not know what writings were to be produced, and therefore could not be prepared to meet them.

In an action brought in New York upon a promissory note alleged to be a forgery, an expert by the name of O'Neil was, on the cross-examination, shown

<sup>1</sup> Howard v. Patrick, 43 Mich. 121, 128; Rose v. First National Bank of Springfield, 91 Mo. 399; Massey v. Bank, 104 Ill. 327.



thirty-three signatures and asked which of them were genuine signatures and which were forgeries. Against the defendant's objection he was allowed to pick out certain of the signatures as genuine, and to testify that he could not say as to the others, but thought that they were genuine. Thereafter a witness was allowed to testify that certain of the signatures which the expert O'Neil had pronounced genuine were written by him, the witness. This was held error, the court saying: "It was not material to the issue to show whether any of those thirty-three signatures were genuine or false. \* \* \* It is plain the signatures were prepared for the sole purpose of testing the skill of witnesses. O'Neil's attention was called to them in the belief that he would not be able to pick out the genuine from the false. He expressed his opinion. The evidence of Williams did not contradict him. It showed his opinion was in some respects inaccurate. But how was it material whether those thirty-three signatures were genuine or not? The issue was as to the signatures to the note. Whether O'Neil was right or wrong as to the thirty-three signatures it did not aid in determining the real issue. It was a collateral issue, and if, by possibility, O'Neil could have been legally permitted or required to answer the question, his answer would have been conclusive upon the plaintiff. She could not afterwards call witnesses to contradict him on that collateral and immaterial issue."<sup>1</sup>

It has been held, however, in the Supreme Court of Indiana, that the accuracy of an expert witness

<sup>1</sup> *Hilsley v. Palmer*, 32 Hun, 472 (1884). The same ruling was made in *Van Wyck v. McIntosh*, 14 N. Y. 439. And see *Dietz v. Fourth National Bank*, 69 Mich. 287, 289.

can be tested on cross-examination by asking him whether the disputed writing and another not admitted to be genuine are in the same handwriting.<sup>1</sup> And in that State, as elsewhere appears, comparison is only allowable, on the direct examination, with writings which are admitted to be genuine.

§ 145. **Detection of Counterfeit Bank Notes.**—Books known as bank note detectors, are not competent evidence as to the genuineness or worthlessness of bank bills, neither is the testimony of a witness who does not profess to be an expert, admissible on the same point.<sup>2</sup> One who is not acquainted with the handwriting of the president or cashier of the bank, but who has studied and learned the system by which it is believed counterfeit bank notes can be detected, and who has such knowledge of the marks and devices used in etching and engraving as enables him to detect gross counterfeits, is competent to testify as an expert concerning the genuineness of bank notes.<sup>3</sup> So where a witness has been in the habit of receiving and paying out notes of the bank, and believes that he has thereby become acquainted with the handwriting of its president and cashier, he is considered qualified by his experience to testify as to the genuineness of notes purporting to have been issued by the bank,<sup>4</sup> although he has never seen these officers write. One who is a bank officer, engaged in banking, and a judge of counterfeit money, is competent to give

<sup>1</sup> *Thomas v. State*, 103 Ind. 419.

<sup>2</sup> *Payson v. Everett*, 12 Minn. 216.

<sup>3</sup> *Jones v. Finch*, 37 Miss. 468.

<sup>4</sup> *Allen v. State*, 3 Humph. (Tenn.) 367; *Commonwealth v. Carey*, 2 Pick. (Mass.) 47; *State v. Candler*, 3 Hawk's Law & Eq. (N. C.) 393; *Sasser v. State*, 13 Ohio, 453; *Hess v. Ohio*, 5 Ohio, 6; *Kirksey v. Kirksey*, 41 Ala. 626; *State v. Allen*, 1 Hawk's L. & Eq. (N. C.) 6.

his opinion as an expert as to the spuriousness of a bank note.<sup>1</sup> A cashier who has received and passed a great number of the notes of the bank in question, and believes he can distinguish between a genuine and counterfeit note, is competent to give his opinion as an expert.<sup>2</sup> The same principle governs in the case of tellers.<sup>3</sup> But bank officers are not the only witnesses who are qualified to testify in such cases. And it has been said that the opinion of any one, who is familiar with the notes of the bank in question may be received.<sup>4</sup> Hence, the testimony of merchants, brokers and others, who are in the habit of receiving, scrutinizing and paying out the notes of the bank, is received as coming from witnesses whose experience renders them qualified to express an opinion.<sup>5</sup> In New Hampshire it is said that a bill may be proved to be a counterfeit by persons who know the signatures of the president and cashier, by having seen the bills in circulation.<sup>6</sup> Experts are allowed to testify as to the false character of bank bills, without first proving that the bank purporting to issue them had an existence,<sup>7</sup> or that it had issued genuine bills of which those in question might be counterfeits.<sup>8</sup> In the case of bills of exchange, it has been held that one who had presented to the firm many notes which had been paid by them, was qualified by his experience to testify

<sup>1</sup> *May v. Dorsett*, 30 Ga. 116; *State v. Hooper*, 2 Bailey (S. C.) Law, 37; *Atwood v. Cornwall*, 28 Mich. 339.

<sup>2</sup> *State v. Harris*, 5 Ired. (N. C.) Law, 287.

<sup>3</sup> *Hess v. Ohio*, 5 Ohio, 6; *Kirksey v. Kirksey*, 41 Ala. 626.

<sup>4</sup> *State v. Hooper*, 2 Bailey (S. C.) Law, 37; *State v. Tutt*, *Id.* 44.

<sup>5</sup> *State v. Cheek*, 13 Ired. (N. C.) 114; *Watson v. Cresap*, 1 B. Mon. (Ky.) 196.

<sup>6</sup> *State v. Carr*, 5 N. H. 369, 373.

<sup>7</sup> *Jones v. State*, 11 Ind. 357.

<sup>8</sup> *Crawford v. State*, 2 Ind. 132.



that, in his opinion, the handwriting of the bill in question was the same as that upon the bills which the firm had paid.<sup>1</sup> Although it cannot be considered as laying down a correct principle of law, it is worthy of note that in an early case in the New York court of sessions, it was ruled that experts should not be allowed to swear as to the genuineness of bank bills, if witnesses could be produced who had seen the president and cashier write.<sup>2</sup>

§ 146. **Regulation of such Evidence by Statutory Provision.**—In some of the States statutory provision has been made as to the reception of evidence in the cases considered in the preceding section. Such provision has been made in Illinois, Indiana, Kansas, Pennsylvania, and perhaps elsewhere.

*Illinois.*—"Persons of skill shall be competent to testify as to the genuineness of any bill, note or other instrument alleged to be forged or counterfeited."<sup>3</sup>

*Indiana.*—"Persons of skill may be called to prove the genuineness of a note, bill, draft, or certificate of deposit, but three witnesses, at least, shall be required to prove the fact, except in the case of a larceny thereof, the simple evidence of the cashier of a bank purporting to have issued the same may be received as sufficient."<sup>4</sup>

*Kansas.*—"Persons of skill or experts may be called to testify as to the genuineness of a note, bill, draft, certificate of deposit, or other writing, but three witnesses, at least, shall be required to prove the fact, except in the case of a larceny thereof, the single evidence of the president, cashier, or teller of the

<sup>1</sup> Gordon v. Price, 10 Ired. (N. C.) 385.

<sup>2</sup> People v. Badger, 1 Wheeler Cr. Cas. 543.

<sup>3</sup> Starr & Curtis, Ann. St. (1885), p. 785, § 155.

<sup>4</sup> 2 Revised Statutes (1876), p. 396, § 91.

bank purporting to have issued the same, or the maker thereof, may be received as sufficient.'"<sup>1</sup>

*Pennsylvania*.—"Upon the trial of any indictment for making, or passing and uttering any false, forged or counterfeit coin, or bank note, the court may receive in evidence to establish either the genuineness or falsity of such coin or note, the oaths or affirmations of witnesses who may by experience and habit have become expert in judging of the genuineness or otherwise of such coin or paper, and such testimony may be submitted to the jury without first requiring proof of the handwriting or the other tests of genuineness, as the case may be, which have been heretofore required by law.'"<sup>2</sup>

In Maine it is provided that in the case of forged bank notes, etc., if the president or cashier reside out of the State, or more than forty miles from the place of trial, the opinions of other witnesses may be received.<sup>3</sup> And in Rhode Island it is provided that the opinions of skilled persons may be received in such cases, provided the persons whose names are forged are out of the State, or reside thirty miles distant from the place of trial.<sup>4</sup>

§ 147. **The Value of Expert Testimony as to Handwriting.**—Any discussion of the subject of expert testimony in handwriting would be incomplete if it should omit some reference to the value attached to that species of testimony. But that subject is considered in a subsequent chapter to which the reader is referred.<sup>5</sup>

<sup>1</sup> General Statutes (1889), vol. 2, § 5284.

<sup>2</sup> Brightly's *Purd. Dig.* (1700-1872), p. 631, § 63.

<sup>3</sup> Revised Statutes (1871), p. 836, § 8.

<sup>4</sup> Public Statutes (1882), p. 589, § 44.

<sup>5</sup> See chapter 11.

## CHAPTER VIII.

## EXPERT AND OPINION TESTIMONY ON QUESTIONS OF VALUE.

## SECTION.

- 148. Proof of Value.
- 149. The Opinions of Experts on the Question of Value.
- 150. The Opinions of Ordinary Witnesses on the Question of Value.
- 151. When the Opinions of Witnesses on the Question of Value are Inadmissible.
- 152. The Competency of the Witness must First be Shown.
- 153. Competency in Particular Cases.
- 154. Form of Question—Amount of Damages.
- 155. The Value of Real Estate.
- 156. Value of Personal Property Generally.
- 157. Value of Services Generally.
- 158. Value of Legal Services.
- 159. Value of Services Rendered by Physicians and Nurses.
- 160. Value of Annuities.
- 161. Value of Foreign Currency and Negotiable Securities.

§ 148. **Proof of Value.**—The value of a thing is sometimes capable of proof as a fact, but many times, and we may even say generally, is provable by the opinion of witnesses. But before proceeding to a consideration of the principles concerning the admissibility of opinions on questions of value, it may be well to call attention to certain general rules governing proof of value:

1. If an article has a market value, that usually controls as the best evidence of its value.<sup>1</sup> But

<sup>1</sup> *Durst v. Burton*, 47 N. Y. 167.



property does not always possess a market value, in which cases witnesses may testify as to their estimate of its value.<sup>1</sup>

2. If the question is as to the value of the article at a particular time, evidence of the price for a brief period before and after the time may be given, if it is impracticable to show the value at the precise time.<sup>2</sup>

3. And if the question is as to the value of the article at a particular place, evidence of the price of such articles at places not distant, or in other controlling markets, can be shown, if it is impracticable to show the value at the precise place<sup>3</sup>.

4. But evidence of the value of the article at other places than the place in question cannot be received if its value at the particular place can be shown.<sup>4</sup>

5. It is usually held that evidence of actual sales of like articles can be shown,<sup>5</sup> the time of sale not being too remote.

6. Evidence of offers to sell like articles, made

<sup>1</sup> *Lanning v. Chicago, etc. Ry. Co.*, 68 Iowa, 502; *St. Louis, etc. R. R. Co. v. Chapman*, 38 Kan. 307.

<sup>2</sup> *Cahen v. Platt*, 69 N. Y. 348, 352; *Abell v. Munson*, 18 Mich. 306; *Denton v. Smith*, 61 Mich. 431.

<sup>3</sup> *Lowell v. County Commissioners*, 146 Mass. 403; *Cahen v. Platt*, 69 N. Y. 348, 352. But the evidence will not be received if the place is too distant. In *Raridan v. Central, etc. Ry. Co.*, 69 Iowa, 531, it was undertaken to prove the value of corn-stalks for winter pasture in a particular neighborhood by a witness who knew their value at a place from six to nine miles from it, and the court held the witness incompetent.

<sup>4</sup> *Gregory v. McDowel*, 8 Wend. 435.

<sup>5</sup> *Sawyer v. Boston*, 144 Mass. 470; *Paine v. Boston*, 4 Allen, 168; *Truitt v. Baird*, 12 Kan. 420; *Gilpin v. Consequa*, 3 Wash. 184; *Northwest Fuel Co. v. Mahler*, 36 Minn. 166; *St. Louis, etc. R. R. Co. v. Haller*, 82 Ill. 208; *Colbertson, etc. Provision Co. v. Chicago*, 111 Ill. 651; *Washburn v. Milwaukee, etc. R. R. Co.*, 59 Wis. 364; *Cherokee v. S. C.*, etc. Co., 52 Iowa, 279. But see *Pittsburg, etc. R. R. Co. v. Patterson*, 107 Pa. St. 461, 464.

by dealers in the ordinary course of business, is admissible to prove market value.<sup>1</sup> And it may be shown as against the owner what he has offered to take for the property, provided the offer was not by way of compromise.<sup>2</sup> But the owner will not ordinarily be allowed to show what he has been offered for his property.<sup>3</sup> So in proving the value of land, evidence as to how much has been offered for adjacent property must as a rule be excluded,<sup>4</sup> although it has been held in Michigan that an offer made in good faith by a neighbor to give a certain sum for the land in question is admissible.<sup>5</sup>

7. In determining the value of property it is allowable to show what the property cost,<sup>6</sup> or was sold for,<sup>7</sup> even at an auction sale.<sup>8</sup>

8. Market values may be proved by reference to market reports published in the daily papers of the market city.<sup>9</sup> But it has been held that a witness cannot be permitted to testify to a knowledge of the market value of a commodity in a distant place,

<sup>1</sup> *Harrison v. Glover*, 72 N. Y. 451.

<sup>2</sup> *Springfield v. Schmook*, 68 Mo. 394.

<sup>3</sup> *Fowler v. County Commissioners*, 6 Allen, 92; *Dickenson v. Fitchburg*, 13 Gray, 546; *Watson v. Milwaukee Ry. Co.*, 57 Wis. 332; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *St. Joseph, etc. R. R. Co. v. Orr*, 8 Kan. 419.

<sup>4</sup> *Concord R. R. Co. v. Greeley*, 23 N. H. 237; *Perkins v. People*, 27 Mich. 386; *Lehmick v. St. Paul, etc. R. B. Co.*, 19 Minn. 464; *Davis v. Charles River Branch R. R. Co.*, 11 Cush. 506.

<sup>5</sup> *Jackson v. Armstrong*, 50 Mich. 65.

<sup>6</sup> *Boggan v. Horne*, 97 N. C. 268; *Small v. Pool*, 8 Ired. (N. C.) 47; *McPeters v. Ray*, 85 N. C. 462; *Ham v. Salem*, 100 Mass. 350; *St. Louis, etc. R. R. Co. v. Smith*, 42 Ark. 265; *Hazen v. Smiley*, 28 Kan. 278.

<sup>7</sup> *Atwood v. Bearss*, 45 Mich. 469; *Greeley v. Stilson*, 27 Mich. 153; *Jennings v. Prentice*, 39 Mich. 421; *Thompson v. Moiles*, 46 Mich. 42; *Buford v. McGetchie*, 60 Iowa, 298; *Clements v. Burlington, etc. R. R. Co.*, 74 Iowa, 442.

<sup>8</sup> *Smith v. Mitchell*, 12 Mich. 180; *Dyer v. Rosenthal*, 45 Mich. 588.

<sup>9</sup> *Sisson v. Cleveland, etc. R. R. Co.*, 14 Mich. 489; *Peter v. Thickstun*, 51 Mich. 589.

when his information is solely derived from reading the market reports in a newspaper published at a remote point.<sup>1</sup>

§ 149. **The Opinions of Experts on the Question of Value.**—The opinions of experts are received in evidence on the question of value.<sup>2</sup> “It is every-day’s practice,” said Mr. Chief Justice NELSON of New York, “to take the opinion of witnesses as to the value of property—persons who are supposed to be conversant with the particular article in question, and of its value in the market: as a farmer, or dealer in, or person conversant with the article, as to the value of lands, cattle, horses, produce, etc. These cases all stand upon the general ground of peculiar skill and judgment in the matters about which opinions are sought.”<sup>3</sup>

This rule, however, did not commend itself to the courts of New Hampshire, and the practice there was to exclude the opinions of witnesses on questions of value, in cases where it was customary in the courts of other States to unhesitatingly receive them, provided only, the witnesses were duly qualified to testify in relation to the subject of inquiry. For example, the practice in that State was to exclude the opinions of witnesses as to the value of real estate, irrespective of any

<sup>1</sup> Fairley v. Smith, 87 N. C. 367.

<sup>2</sup> Brown v. Providence & Springfield R. R. Co., 12 R. I. 238; Buffum v. N. Y. Cent., etc. R. R. Co., 4 R. I. 221; Forbes v. Howard, 4 R. I. 366; Cantling v. Hannibal, etc. R. R. Co., 54 Mo. 385; Hough v. Cook, 69 Ill. 381; Shaw v. City of Charlestown, 2 Gray (Mass.), 109; Edmonds v. City of Boston, 108 Mass. 535; Dickenson v. Fitchburg, 13 Gray (Mass.), 546; Cobb v. City of Boston, 109 Mass. 438; Burger v. Northern Pacific R. R. Co., 22 Minn. 343, 347; Crawford v. Wolf, 29 Iowa, 568; Tebbetts v. Haskins, 16 Me. 283, 289; Sexton v. Lamb, 27 Kan. 426.

<sup>3</sup> Lincoln v. Saratoga, etc. R. R. Co., 23 Wend. 425, 433.



question as to their qualifications.<sup>1</sup> The exclusion was based on the assumption that the ordinary value of land of a particular description, within the county, was a matter of public notoriety, and was, therefore, such a question as the jury, required by statute to be composed of freeholders, would be fully conversant with, and abundantly able to decide. So in the same State the courts have held that there was nothing in the study, or ordinary observation of horses which entitled a witness to be introduced as an expert as to their value.<sup>2</sup> This practice of excluding opinions in such cases was found not to work well, and was embarrassing to the jury, as well as prejudicial to the rights of the parties interested in the litigation. The legislature accordingly interfered, and provided as follows: "The opinions of witnesses as to the value of any real estate, goods or chattels, may be received as evidence thereof, when it appears to the court that they are qualified to judge of such value."<sup>3</sup>

§ 150. **The Opinions of Ordinary Witnesses on the Question of Value.**—The opinions of ordinary witnesses may also be received in evidence on questions of value. It is not necessary that the witness should be an expert to testify as to value, but it may be proved by the opinion of any witness possessing knowledge on the subject.<sup>4</sup> The opinions of persons acquainted with the value of property are sometimes

<sup>1</sup> Rochester v. Chester, 3 N. H. 364; Petterborough v. Jaffrey, 6 N. H. 462; Hoitt v. Moulton, 1 Foster, 586; Marshall v. Columbian Mutual Fire Ins. Co., 7 Foster, 157.

<sup>2</sup> Robertson v. Stark, 15 N. H. 109; Low v. Connecticut, etc. R. R. Co., 45 N. H. 370, 381.

<sup>3</sup> General Laws of New Hampshire (1878), p. 532, § 23.

<sup>4</sup> Central R. R. Co. v. Wolf, 74 Ga. 664; San Diego Land, etc. Co. v. Neale, 78 Cal. 63, 76; Terre Haute, etc. R. R. Co. v. Crawford, 100 Ind. 530; Alt v. California Fig, etc. Co., 19 Nev. 118.

received in evidence, although such knowledge may not be the result of any peculiar skill in any particular branch of business, or department of science.<sup>1</sup> They are received upon the ground of necessity.<sup>2</sup> "These opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on special study or training, or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable evidence of the fact to be proved."

A distinguished writer has stated the rule as follows:

"Two essentials, therefore, exist to a proper estimate of value:

"*First.* A knowledge of the intrinsic properties of the thing.

"*Secondly.* A knowledge of the state of the markets. As to such intrinsic properties as are occult and out of the range of common observers, experts are required to testify; as to the properties which

<sup>1</sup> Swan v. Middlesex, 101 Mass. 173; Wyman v. Lexington, etc. R. R. Co., 13 Met. (Mass.) 216, 326; Dalzell v. City of Davenport, 12 Iowa, 437, 440; Whitfield v. Whitfield, 40 Miss. 352, 358; Cantling v. Hannibal, etc. R. R. Co., 54 Mo. 385; Continental Ins. Co. v. Horton, 28 Mich. 173; Printz v. People, 42 Mich. 144; Richardson v. McGoldrick, 43 Mich. 476; Keables v. Christie, 47 Mich. 595; Whitesell v. Crane, 8 W. & S. (Penn.) 372; McGill v. Rowand, 3 Pa. St. 452; Mish v. Wood, 34 Pa. St. 451, 454; Thatcher v. Kaucher, 2 Col. 698; Cooper v. State, 53 Miss. 393; Cooper v. Randall, 59 Ill. 317, 320; Washington, etc. Co. v. Webster, 68 Me. 449; Anson v. Dwight, 18 Iowa, 244; Foster v. Ward, 75 Ind. 594; Pittsburg, etc. R. R. Co. v. Rose, 74 Pa. St. 362, 368; Chamness v. Chamness, 53 Ind. 304; Sullivan v. Lear, 23 Fla. 463.

<sup>2</sup> Wyman v. Lexington, etc. R. R. Co., 13 Met. (Mass.) 316, 323; Dalzell v. City of Davenport, 12 Iowa, 437, 440.

<sup>3</sup> Swan v. Middlesex, 101 Mass. 173, per Gray, J.

are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted to testify.”<sup>1</sup>

§ 151. **When the Opinions of Witnesses on the Question of Value are Inadmissible.**—The rule that the opinions of witnesses are admissible on questions of value, is inapplicable in those cases in which the subject of value is susceptible of specific proof. Hence, in a recent case in the United States Court of Claims, the court declared that the testimony of experts could not be received to show the value of a cotton factor's outlays for insurance, freight, rebating, etc., inasmuch as specific proof could be given of the outlays actually made by the factor.<sup>2</sup> And in a case in New York where a witness, who stated that he knew the effect on fat cattle of getting out of an inclosure and wandering about, was asked what, in his opinion, would be the shrinkage of certain cattle, which he had not seen, resulting from such a tramp, it was held that he could not answer. The court said: “To admit this was to extend the admissibility of evidence by experts too far. There could be no difficulty, in this case, in showing the actual injury to the cattle which followed their escape and their wandering about. If they had shrunk in weight, or had been injured in appearance, these facts could have been proved by those who saw them. For these were plain and conspicuous results. To prove what is the usual effect of such an escape on such cattle is to substitute conjecture for certainty.”<sup>3</sup>

<sup>1</sup> 1 Wharton's Evidence, § 447.

<sup>2</sup> Patten v. United States, 15 Ct. of Cl. 288. See, too, Page v. Hazard, 5 Hill (N. Y.), 603.

<sup>3</sup> Schernerhorn v. Tyler, 11 Hun, 551.



The object, of course, was to show the depreciation in value of the cattle.

The opinions of witnesses will be incompetent wherever the *data* upon which the conclusions of the experts are based, do not have that certainty of relation which entitles them to authority as a law of science. It has, for this reason, been held that a conjectural deduction, or generalization, made by experts upon the operation of other railroads was incompetent evidence for the purpose of showing the worth of the government's right to use the plaintiff's road.<sup>1</sup> The experts were persons specially familiar with railroads and railroad accounts, and the claimants contended that they had proven by them that 20 per cent. of the gross transportation earnings of a railroad was a reasonable and proper deduction for the use of a railroad, and that they were, therefore, entitled to recover 80 per cent. of their tariff rates. The court refused to consider the evidence on the ground that, inasmuch as railroads differed in their essential features, the *data* were too uncertain to entitle them to authority as a law of science. While, on the other hand, it has been held that the opinions of witnesses specially acquainted with the business of the railroad in question, and of the expenses of operating it, would be competent evidence as to the value of the use of the particular road during a given time,<sup>2</sup> yet there may be inquiries as to value which, from their very nature, cannot be answered by any one as an expert. Such would be an inquiry into the value of the reversion of land over which a railroad is located; the

<sup>1</sup> Atchison, etc. R. R. Co. v. United States, 15 Ct. of Cl. 126.

<sup>2</sup> Sturgis v. Knapp, 33 Vt. 486.

value of which necessarily depends on the length of time that the public easement over it may continue. As the essential element on which the inquiry turns is one in relation to which there has been no experience, it follows that an expert could not be heard to express an opinion thereon.<sup>1</sup>

§ 152. **The Competency of the Witness must First be Shown.**—Whenever it is desired to have the opinions of a witness on the subject of value, it is always necessary, whether the witness is offered as an expert or not, to lay some foundation for the introduction of his opinion, by showing that he has had the means to form an intelligent opinion, “derived from an adequate knowledge of the nature and kind of property in controversy, and of its value.”<sup>2</sup> Where a witness is produced to testify, in the character of an expert, as to the value of property, it should appear that he has some special skill or experience, or peculiar knowledge of the value of the class of property about which it is proposed to question him.

It is impossible, however, to define with any precision the degree of special knowledge which the witness should possess in order to render him competent.<sup>3</sup> The witness should have peculiar knowledge of the property and of its value, is the language

<sup>1</sup> *Boston, etc. R. R. Co. v. Old Colony, etc. R. R. Co.*, 3 Allen (Mass.), 142, 147.

<sup>2</sup> *Whitney v. City of Boston*, 98 Mass. 315. In this case it was held no error to exclude the opinion of a shoemaker as to the value of land, who had hired one of several buildings on the land, occupying the upper stories and underletting the lower. And see *Chambovet v. Cagnet*, 3 J. & S. (N. Y.) 474; *Haight v. Kimbak*, 51 Iowa, 13; *Reed v. Drais*, 67 Cal. 491; *Daly v. N. W. Kimball Co.*, 67 Iowa, 132; *Russell v. Hayden*, 40 Minn. 88.

<sup>3</sup> *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367, 370.

of the decisions.<sup>1</sup> "The evidence of experts is received on the ground of science or skill, and witnesses may speak on the value of property or labor, where it appears they have peculiar sources of knowledge to guide them on these subjects, and which are not presumed to be equally within the reach of the jury."<sup>2</sup> The matter may be made, perhaps, more clear by a reference to some of the cases:

1. A dealer, in any particular kind of articles, in the absence of evidence to the contrary will generally be presumed to have sufficient knowledge of the value of those articles to qualify him to testify with regard thereto.<sup>3</sup>

A witness who had experience and knowledge of sales by retail of such articles as sugar, whisky, tobacco and ale, and of the losses which, according to his own experience in the course of several years, were the results of sales of such goods in small quantities, has been allowed to testify that it would be impossible to realize by small sales the amount of the retail prices on the entire quantity of articles sold, and to give his reasons therefor, and to testify that, as the result of his own experience, his opinion was that small retail sales of such articles would cause, in ordinary cases, a loss of 5 per cent upon the total amount of goods so sold.<sup>4</sup>

In a case in Iowa it was held that a husband and wife, who were the owners of ordinary household

<sup>1</sup> *Terpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279.

<sup>2</sup> *Lamoure v. Caryl*, 4 Denio (N. Y.), 373.

<sup>3</sup> *Lawton v. Chase*, 108 Mass. 238; *Cantling v. Hannibal, etc. R. R. Co.*, 54 Mo. 385; *Luse v. Jones*, 39 N. J. Law, 708; *Sturn v. Williams*, 38 N. Y. Sup. Ct. 325; *Johnston Harvester Co. v. Clark*, 31 Minn. 165; *Reed v. New*, 35 Kan. 727; *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 336; *Hinckley v. Kersting*, 21 Ill. 247; *Burger v. Northern Pacific R. R. Co.*, 22 Minn. 343.

<sup>4</sup> *M'Fadden v. Murdock*, 1 Irish R. (C. L.) 211.



goods, might testify as to the value of such goods without proof having been made of their knowledge of the value of such goods, the court declaring that such knowledge would be presumed.<sup>1</sup>

2. It is not necessary that the expert witness testifying as to value should have any personal knowledge of the value of the article in question. Thus, a witness who had been a ship-broker and ship-owner for years, and who testified that he knew the fair market value of ships in the port of New York, has been allowed to testify as to the fair market value of a certain ship, although his knowledge of her was substantially confined to the information he got from the general records used in his business and reports made therein, by which, he testified, he was always guided in buying and selling ships.<sup>2</sup>

As experts may testify where they have no personal knowledge of the facts in controversy, basing their opinions upon the facts which have been testified to by other witnesses, so the opinion of an expert may be received as to the value of articles similar to one which has been described by witnesses having personal knowledge of it, although such expert has never seen the particular article in question which has been lost or destroyed. No reason is perceived why an expert, testifying in respect to value, should be governed by a different principle in this respect than that which applies to experts testifying upon other subjects.

In a case in Pennsylvania in which this question was considered, it was said: "What is, then, to prevent a merchant from testifying, in corroboration of an invoice, as to values, where no values are given,

<sup>1</sup> *Tubbs v. Garrison*, 68 Iowa, 44.

<sup>2</sup> *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 53.

when goods are lost? The fact of the existence or loss of the goods is not touched by such testimony. That remains to be established by other evidence. I think I have known many instances of this kind. If a trunk should be packed by a servant incapable of placing a value on the wardrobe of his or her master or mistress, although able to testify to each article and describe its quality, yet wholly incompetent to give the slightest idea of the real value of the articles, in case of loss how is the value to be ascertained but by the testimony of a tradesman acquainted with the value of such articles, based upon a description of them? So in regard to furniture insured, and lost by fire, it can hardly be doubted but that it would be competent to fix the value by persons acquainted with such matters, and competent as such to testify, after its quality had been described. If the rule be, that only persons who have seen the articles which have been lost can give an estimate of their value, then, in all the cases suggested, there would be a failure to recover for a loss, or the jury would be left to guess at their value."<sup>1</sup>

Accordingly, a nurseryman has been allowed to testify as to the value of trees which had been destroyed, and which he had not seen, but had heard described.<sup>2</sup> And where the question was as to the cost of rebuilding a house which had been burned, a contractor and builder of houses, who had the house in question described to him in detail, has been allowed to express an opinion as to its value.<sup>3</sup> Other cases of similar import have been decided.<sup>4</sup>

<sup>1</sup> *Mish v. Wood*, 34 Pa. St. 451.

<sup>2</sup> *Whitbeck v. N. Y., etc. R. R. Co.*, 36 Barb. (N. Y.) 644.

<sup>3</sup> *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551.

<sup>4</sup> *Orr v. Mayor, etc.*, 64 Barb. 106; *Miller v. Smith*, 112 Mass. 470, 475;

3. When a witness testifies as to the value of property from a personal examination which he has made of it, the admissibility of his opinion will depend upon whether the time of examination was so remote to the time of inquiry as to have no relevance to the inquiry. The fact that the knowledge which the witness possesses of the property relates to its value at an earlier date than the one at issue will not render his opinion inadmissible, unless the earlier date is so remote as to render his opinion of no importance in the inquiry.<sup>1</sup>

Thus, in the case above cited, the knowledge of the expert related to the value of the property as it was six months before he was called upon to testify. But the court admitted the testimony, not regarding the time as too remote, under the circumstances of the particular case. And when the inquiry was as to the value of a vessel, and the witness had not seen her for five or six years, and since that time \$7,000 had been spent in repairs on her, the lower court excluded his testimony on the ground that the witness was not qualified. The Court of Appeals, however, said: "While it would not, we think, have been erroneous to receive and submit the evidence to the jury for what it was worth, we cannot say, as matter of law, that the judge exceeded the bounds of a reasonable discretion in holding that the witness was not qualified as an expert to give an opinion as to the value of the ship at the time she was burned."<sup>2</sup>

*Beecher v. Dennison*, 13 Gray (Mass.), 354. In *Miller v. Smith*, *supra*, a witness possessing special knowledge and experience was permitted to express an opinion as to the value of fast trotting horses of a certain age, size, gate, speed, and other qualities, although he had not seen the horse in question.

<sup>1</sup> *Cobb v. City of Boston*, 109 Mass. 438.

<sup>2</sup> *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56.



The time at which the witness saw the property is immaterial, provided it is shown by other testimony that the property was in substantially the same condition at the time the witness saw it as at the time at which its value is to be fixed.<sup>1</sup>

It is evident that much must depend on the nature of the property. A period of time which would not be remote as to real estate might be too remote as to personalty, or what would be remote as to realty in one part of the country would not be remote in another part, where the value of such property changes slowly.

If the witness is produced to testify as to the value of services he cannot be permitted to testify until it appears, either from his own or other competent evidence, that he is acquainted with the usual value or rate of compensation paid for like services at the time when, and place where, the services were rendered.<sup>2</sup> He must be possessed of special knowledge on the subject.<sup>3</sup>

§ 153. **Competency in Particular Cases.**— We have stated in preceding sections some general rules governing the competency of witnesses to testify on the subject of value. A reference, however, to some particular cases in which the question of competency has been raised may perhaps be found helpful:

The opinion of an *author* is received as to the value of his literary productions, his opinion being based on the time and labor employed in the preparation of the work.<sup>4</sup>

<sup>1</sup> *Connelly v. Edgerton*, 22 Neb. 82.

<sup>2</sup> *Louisville, etc., R. R. Co. v. Cox*, 30 Ill. App. Ct. 380; *Larmoure v. Caryl*, 4 Denio, 370.

<sup>3</sup> *Sener v. Hoist*, 31 Minn. 479.

<sup>4</sup> *Babcock v. Raymond*, 2 Hilton (N. Y.), 61.

An *architect* is allowed to testify as to the value of houses, and, in the case cited, the witness was permitted to testify as to the depreciation in the value of buildings in a neighborhood, as caused by a nuisance.<sup>1</sup>

An *artist* may testify as an expert as to the value of a picture.<sup>2</sup>

A *broker* is competent to testify as to the value of stocks.<sup>3</sup>

A *carpenter*, engaged in buying lumber and building houses, is a competent witness as to the value of the lumber in a particular house.<sup>4</sup> And carpenters have been permitted to testify as to the value of a house which had been destroyed by fire, it appearing that they possessed a general acquaintance with the house in question, having a knowledge of its shape, location, external appearance, and, to some extent, its internal condition.<sup>5</sup> Such persons have also been allowed to express an opinion as to the cost of building a house in the vicinity of the town where they worked, their opinions being based on an examination of the plans and specifications of the house.<sup>6</sup> In a recent case in New York, it is laid down that a carpenter and builder, an architect, or an insurance and real estate agent engaged in appraising similar property, would be competent to express an opinion as to the value of replacing a house destroyed by fire, their opinion being based on knowledge which they

<sup>1</sup> Gauntlet v. Whitworth, 2 C. & K. 720.

<sup>2</sup> Houston, etc., R. R. Co. v. Burke, 55 Tex. 324.

<sup>3</sup> Jonan v. Ferrand, 3 Rob. (La.) 366.

<sup>4</sup> Simmons v. Carrier, 68 Mo. 416; Shepard v. Ashley, 10 Allen (Mass.), 542.

<sup>5</sup> Bedell v. Long Island R. R. Co., 44 N. Y. 367.

<sup>6</sup> Hills v. Home Ins. Co., 129 Mass. 345.

had acquired as dealers or builders.<sup>1</sup> So, too, it has been held that a carpenter and builder who had seen the buildings in question, and knew the kind and quality of lumber put into them, was qualified to testify what it was reasonably worth to put the lumber into the buildings.<sup>2</sup>

*Mechanics and machinists* have been allowed to testify as to the difference in value of an engine before and after an accident which happened to it.<sup>3</sup> Where the question was as to the value of a particular threshing machine, a witness who testified that he had run a threshing machine for six or eight years, and had seen the particular machine in operation, was adjudged competent to express an opinion as to how much less such machine was worth than other machines that would run and do first-class work.<sup>4</sup>

But in a case in Minnesota a witness who had no knowledge of the market value of machines of the kind in question, was held incompetent to express any opinion as to its value although he had worked the machine.<sup>5</sup>

A superintendent of locomotive works, who was familiar with the cost of building, rebuilding and repairing locomotives, and with the value of the materials used therein and the labor employed thereon, has been permitted to answer the following question: "Could the engine (which you have seen) by any possibility have been so damaged by wear and tear, or by accident that, with the parts or materials as testified to by Mr. F., \$20,000 would have been a

<sup>1</sup> Woodruff v. Imperial Fire Ins. Co., 83 N. Y. 133, 138; s. c., 10 Ins. Law J. 125. See also Tebbetts v. Haskins, 16 Me. 283.

<sup>2</sup> Hough v. Cook, 69 Ill. 581.

<sup>3</sup> Moore v. Township of Kenockee, 75 Mich. 332, 343.

<sup>4</sup> Sheldon v. Booth, 50 Iowa, 209.

Osborne v. Marks, 33 Minn. 56.



reasonable charge for rebuilding her?"' <sup>1</sup> So one who had purchased and sold machinery of a peculiar kind, and owned and run it, and had made estimates of the cost of building such machinery, and had procured such estimates of other machinists for the purpose of having such machines manufactured, has been held competent to testify as to the value of such machinery.<sup>2</sup> And mill-wrights are competent witnesses as to the value of work done on a mill,<sup>3</sup> and machinists as to the value of particular machinery.<sup>4</sup>

*Farmers, graziers and drovers* have been held competent to testify as to the value of growth and increase of weight which certain cattle might reasonably have been expected to attain but for the over-feeding of the pasture where they grazed.<sup>5</sup> A farmer has been permitted to testify as to the loss in value of a cow by allowing her to become dry.<sup>6</sup> So he has been held competent to express an opinion as to the value of a mare of common blood<sup>7</sup> and as to the value of grass destroyed by cattle.<sup>8</sup> And a farmer living in the neighborhood where certain farm horses were sold, who knew their value and the character of the work done by them upon the farm and who had hired horses to do such work for himself, was held qualified to testify as to the value of the use of such a team.<sup>9</sup> Where the value of a blooded stallion was in question, a farmer engaged in raising horses

<sup>1</sup> *Tyng v. Fields*, 5 N. Y. Sup. Ct. 672.

<sup>2</sup> *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432.

<sup>3</sup> *Adams v. Dale*, 29 Ind. 273.

<sup>4</sup> *Steam Packet Co. v. Sickels*, 10 How. (U. S.) 419; *Winter v. Burt*, 31 Ala. 33.

<sup>5</sup> *Gilbert v. Kennedy*, 22 Mich. 117.

<sup>6</sup> *Smith v. Wilcox*, 4 Hun, 411.

<sup>7</sup> *Brown v. Moore*, 32 Mich. 254.

<sup>8</sup> *Townsend v. Brundage*, 6 Thomp. etc. (N. Y.) 527

<sup>9</sup> *Kennett v. Fickel*, 41 Kan. 211.

for the market was held competent to testify in regard to the animal, whether he was acquainted with that particular breed of animals or not.<sup>1</sup>

*Some Miscellaneous Cases.*—Persons experienced in building railroads may testify what will be, in their opinion, the probable cost of completing a railroad.<sup>2</sup> A gunsmith is, by reason of his knowledge of fire-arms, a competent witness as to the value of a gun.<sup>3</sup> The opinion of a witness as to the value of a franchise granted by a city for the construction and operation of a wharf, has been received when his opinion was based upon his own experience in constructing and operating a wharf under a similar franchise, and his opinion was not made inadmissible by the fact that the witness could not state its value when considered without reference to the ability of the person owning it to build a wharf and make business for it.<sup>4</sup>

On a trial for the larceny of a seal skin coat the only witness who testified as to its value stated that he had never seen a seal skin overcoat bought or sold, and it was not shown that he had any knowledge of the value of such an article except such as any man of ordinary intelligence might be presumed to have. The prisoner claimed that no legal proof of the value of the overcoat had been made. The Supreme Court of Iowa disposed of the objection against the prisoner, in language given in the note below.<sup>5</sup>

<sup>1</sup> Gere v. Council Bluffs Ins. Co. 67 Iowa, 272.

<sup>2</sup> Waco, etc. R. R. Co. v. Shirley, 45 Tex. 355.

<sup>3</sup> Cooper v. State, 53 Miss. 393; Beecher v. Denniston, 13 Gray (Mass.). 354.

<sup>4</sup> Sullivan v. Lear, 23 Fla. 463.

<sup>5</sup> "We do not think, however, that we should be justified in wholly discarding his testimony. He might not be a very accurate judge of the value of such an article, but we think that, having seen and examined

In a case in Vermont, an attorney, who was not an expert in the use, value, or manufacture of locomotives, but had made some investigation as to the value of the engine in controversy, was allowed to testify as to its value.<sup>1</sup>

When a farmer testified what in his opinion it would cost to repair his house, which had been damaged by a tornado, but on his cross-examination stated that he was no mechanic, and could not tell how badly the house was damaged, nor how much repairing would be necessary, the court held that on motion his opinion should have been excluded.<sup>2</sup>

In a proceeding for the assessment of damages caused by diverting a stream from flowing through a meadow, thereby destroying its possible use for the cultivation of cranberries, a witness who had never cultivated cranberries, but who knew of a cranberry bog and was connected with a company interested in cranberry meadows, who thought he knew something of cranberry culture, and who had seen the meadow in question, was allowed to give his opinion as to the value of the water that would be sufficient to flood such a meadow, and this although he had never made any experiments in the raising of cranberries, or in the flow of water over them.<sup>3</sup>

§ 154. **Form of Question—Amount of Damages.**—We find it laid down generally in the authorities, the coat, he might form some opinion about it. He doubtless could judge with considerable accuracy of the value of such overcoats as are in common use, and he could judge, we think, though perhaps not as accurately, how this compared in value with the best of such coats. We think that his testimony was not inadmissible, and, if not, the verdict was not without support." *State v. Finch*, 70 Iowa, 316.

<sup>1</sup> *Railroad Company v. Bixby*, 57 Vt. 548.

<sup>2</sup> *Lewis v. Burlington Ins. Co.*, 71 Iowa, 97.

<sup>3</sup> *Warren v. Spencer Water Co.*, 143 Mass. 155.



that on questions as to the amount of damages resulting from a particular transaction, witnesses, whether experts or not, cannot express an opinion but are confined to a description of the injuries; it being the duty of the jury to estimate the damages from the facts proven as to the nature and character of the injuries.<sup>1</sup>

In the leading case in this country<sup>2</sup> it was said that the amount of damages is not a matter of science upon which opinions may be received in evidence, the court adding: "The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury. If there be any rule without exception, it is this; and I have been unable to find any instance where the opinion of witnesses has been received." This was said in 1837 in a case where the question of damages rested on very complicated premises. And in 1886 we find the Supreme Court of Arkansas stating the same thing: "This is one of the few subjects," that court says, "upon which there is absolutely no con-

<sup>1</sup> *Bain v. Cushman*, 66 Vt. 343; *Yost v. Conroy*, 92 Ind. 464; *Central R. R. Co. v. Linn*, 73 Ga. 705; *Burlington, etc. R. R. Co. v. Beebe*, 14 Neb. 463; *Little Rock, etc. R. R. Co. v. Haynes*, 47 Ark. 497; *Fremont, etc. R. R. Co. v. Marley*, 25 Neb. 138, 145; *Lincoln v. Saratoga, etc. R. R. Co.*, 23 Wend. (N. Y.) 433; *Dunham v. Simmons*, 3 Hill (N. Y.), 609; *Fish v. Dodge*, 4 Denio (N. Y.), 311; *Thompson v. Dickhart*, 66 Barb. (N. Y.) 604; *Terpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279; *Whitmore v. Bischoff*, 5 Hun (N. Y.), 176; *Fleming v. Delaware, etc. Canal Co.*, 8 Hun (N. Y.), 358; *Evansville R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Sinclair v. Roush*, 14 Ind. 450; *Mitchell v. Allison*, 29 Ind. 43; *Bissell v. Wert*, 35 Ind. 54; *Ohio, etc. R. R. Co. v. Nickless*, 71 Ind. 271; *Pierson v. Wallace*, 7 Ark. 282; *Central Railroad, etc. Co. v. Kelly*, 58 Ga. 107; *Wilcox v. Leake*, 11 La. Ann. 178; *Atlantic, etc. R. R. Co. v. Campbell*, 4 Ohio St., 583; *Cleveland, etc. R. R. Co. v. Ball*, 5 Ohio St. 568; *Roberts v. Commissioners of Brown County*, 21 Kans. 248; *Whitmore v. Bowman*, 4 Greene (Iowa), 148; *Auson v. Dwight*, 18 Iowa, 244.

<sup>2</sup> *Norman v. Wells*, 17 Wend. 136.

flict in the authorities. A witness is never permitted to estimate the amount of damages which a party has sustained by the doing, or not doing, of a particular act.”<sup>1</sup> But in 1882 the Supreme Court of South Carolina, in an action for breach of promise of marriage, decided that no error was committed in allowing witnesses who were intimate acquaintances of the plaintiff, who knew her temperament and disposition—her social position and all her surroundings, to give their opinion in dollars and cents as to the amount of damages which she had sustained.<sup>2</sup> In 1871 the Supreme Court of Pennsylvania held no error was committed in receiving the opinion of witnesses as to the amount of damages, and it laid down the law as follows: “As to unliquidated damages, the result of an injury complicated in its circumstances, a witness acquainted personally with all the facts must be permitted to give his opinion. Such matters are difficult of description, very few men being gifted with that power of description of complex subjects which can picture them to the minds of others, so as to convey a true idea of the reality. An opinion of total or aggregate loss or value is therefore permitted to go to the jury as some evidence of the fact.”<sup>3</sup> In that case the action was to recover damages for an injury to land resulting from an overflow of the same caused by placing obstructions in the channel of a river.

In many cases the question of damages and the question of value are identical. The two questions are identical whenever the amount of damages depends wholly on the question of value. Inasmuch

<sup>1</sup> *L. R., etc. R. R. Co. v. Haynes*, 47 Ark. 497, 501.

<sup>2</sup> *Jones v. Fuller*, 19 S. C. 66.

<sup>3</sup> *White Deer Creek Improvement Co. v. Sassaman*, 67 Pa. St. 415, 42

as a witness may express an opinion on the question of value, it would seem that he should likewise be allowed to express an opinion on a question as to the amount of damages—whenever that question depends entirely on a question of value. Hence, in condemnation proceedings, where the question is as to the damage which will be done to land by the construction of a railroad over it, the question of damage is identical with the question of its diminution in value in consequence of such construction. What material difference does it make in such a case whether the witness is allowed to state his opinion as to the amount of damage, or is asked, first, his opinion as to the value of the land before the construction of the road, and then his opinion as to its value after the construction of the road, while the jury is left to make the subtraction? And yet on this very question the courts have developed a decided conflict of authority.

In many of the States the witnesses are not allowed to state their opinion as to the amount of damage sustained, but are required to state their opinion as to the value of the property *before* the taking for the public use and its value *after* such taking. It is so held in the cases cited below.<sup>1</sup> But the weight of

<sup>1</sup> *Alabama*.—*Alabama, etc. R. R. Co. v. Burkett*, 42 Ala. 83; *Montgomery, etc. R. R. Co. v. Varner*, 19 Ala. 185.

*Georgia*.—*Brunswick, etc. R. R. Co. v. McLaren*, 47 Ga. 546.

*Indiana*.—*Yost v. Conroy*, 92 Ind. 464; *Hagaman v. Moore*, 84 Ind. 496; *New Albany, etc. R. R. Co. v. Huff*, 19 Ind. 315; *Evansville, etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120.

*Iowa*.—*Harrison v. Iowa, etc. R. R. Co.*, 36 Iowa, 323; *Cannon v. Iowa City*, 34 Iowa, 203; *Prosser v. Wapello*, 18 Iowa, 262.

*Kansas*.—*Ottawa, etc. R. R. Co. v. Adolph*, 41 Kan. 600; *Parsons Water Co. v. Knapp*, 33 Kan. 752. But see *Leavenworth, etc. R. R. Co. v. Paul*, 28 Kan. 816.

*Michigan*.—In this State the witnesses are not allowed to express an opinion as to the amount of compensation which should be given. Such



authority in the courts of this country seems to be opposed to the doctrine above laid down, and to be in favor of allowing the witness to express, in such cases, his opinion as to the amount of the damage sustained by the taking.<sup>1</sup> The cases so holding not only conform to the weight of authority but are justified on principle. As said in a well con-

testimony is said to be "clearly incompetent." "That amount," says the court, "was the very thing which the constitution refers to the jury, and they must make up their own conclusions from proper *data*." It does not appear what *data* were laid before the jury, or what the court considered "proper *data*" to be. *Grand Rapids v. R. R. Co.*, 58 Mich. 642.

*Nebraska*.—*Fremont, etc. R. R. Co. v. Whalen*, 11 Neb. 585; *Burlington, etc. R. R. Co. v. Beebe*, 14 Neb. 463; *Burlington, etc. R. R. Co. v. Schluntz*, 14 Neb. 421. But see *Republican Valley R. R. Co. v. Arnold*, 13 Neb. 485; *Northeast, etc. R. R. Co. v. Frazier*, 25 Neb. 53.

*Ohio*.—*Cleveland, etc. R. R. Co. v. Ball*, 5 Ohio St. 568; *Atlantic, etc. R. R. Co. v. Campbell*, 4 Ohio St. 583.

*Rhode Island*.—*Brown v. Providence, etc. R. R. Co.*, 12 R. I. 238; *Tingley v. Providence*, 8 R. I. 493.

<sup>1</sup> Opinions as to the amount of damage in such cases will be received in the following courts:

*Arkansas*.—*Texas, etc. Ry. Co. v. Kirby*, 44 Ark. 103; *St. Louis, etc. Ry. Co. v. Anderson*, 39 Ark. 167; *Texas, etc. Ry. Co. v. Eddy*, 42 Ark. 527.

*Illinois*.—*Spear v. Drainage Commissioners*, 113 Ill. 632; *Chicago v. McDonough*, 112 Ill. 85; *Hays v. Ottawa, etc. R. R. Co.*, 54 Ill. 373.

*Maine*.—*Snow v. Boston, etc. R. R. Co.*, 65 Me. 230.

*Massachusetts*.—*Swan v. County of Middlesex*, 101 Mass. 173; *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen, 115.

*Minnesota*.—*Emmons v. Minneapolis, etc. R. R. Co.*, 41 Minn. 133; *Leber v. Minnesota, etc. R. R. Co.*, 29 Minn. 256; *Simmons v. St. Paul, etc. R. R. Co.*, 18 Minn. 168, 184; *Lehmiche v. St. Paul, etc. R. R. Co.*, 19 Minn. 406, 464; *Sherman v. St. Paul, etc. R. R. Co.*, 30 Minn. 227.

*New York*.—*Hine v. New York, etc. R. R. Co.*, 36 Hun, 293; *Rochester, etc. R. R. Co. v. Budlong*, 6 How. Pr. 467; *Matter of Utica, etc. R. R. Co.*, 56 Barb. 456. But see *Matter of N. Y., etc. R. R. Co.*, 29 Hun. 609.

*Oregon*.—*Portland v. Kamm*, 10 Oreg. 383.

*Pennsylvania*.—*Pittsburgh, etc. R. R. Co. v. Robinson*, 95 Pa. St. 426; *White Deer Creek Improvement Co. v. Sassaman*, 67 Pa. St. 415.

*Texas*.—*Telephone Telegraph Co. v. Forke*, 2 Tex. App. Civil Cas. 318.

*West Virginia*.—*Railroad Co. v. Foreman*, 24 W. Va. 662.

*Wisconsin*.—*Washburn v. Milwaukee, etc. R. R. Co.*, 59 Wis. 364; *Neilson v. Chicago, etc. R. R. Co.*, 58 Wis. 516; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60.

sidered case in New York: "There is clearly no such inherent distinction between questions of value and questions of damages, if you exclude from the latter all idea of any legal rule or measure of damages, as will bring one within and the other without the province of opinions from witnesses."<sup>1</sup> And there certainly seems to be a growing tendency to permit witnesses to express an opinion on the amount of damages in cases where the value of property is in issue.<sup>2</sup>

Where land is condemned for a right of way, the land owner in making his proofs is not confined to mere expert testimony as to values before and after location, but he may put the jury in possession of such facts as will enable it to make the proper estimate of damage therefrom.<sup>3</sup>

§ 155. **The Value of Real Estate.**—The cases are numerous in which it has been necessary to determine the value of real estate, and they recognize the principle that the value of land can be shown by the testimony of experts, or by that of ordinary witnesses who have special knowledge on the subject.

1. Real estate agents who state that they are acquainted with the value of real estate in the neighborhood in which the property in question lies, are certainly competent witnesses as to the value of the same.<sup>4</sup> And such witnesses are competent without proof that their knowledge is based on actual sales.

<sup>1</sup> Rochester, etc. R. R. Co. v. Budlong, 10 How. Pr. Rep. 289, 294.

<sup>2</sup> See Lewis on Eminent Domain, § 436; Mills on Eminent Domain, § 165.

<sup>3</sup> See Pingery v. Cherokee, etc. Ry. Co., 78 Iowa. 438, 442.

<sup>4</sup> Bristol County Savings Bank v. Keavy, 128 Mass. 298.

<sup>5</sup> Chicago, etc. R. R. Co. v. Blake, 116 Ill. 163.

That fact goes to the value of the testimony rather than to its competency.

A real estate agent accustomed to value and sell real property in the city or neighborhood where the land is situated, is competent to testify in reference to its value, although he himself has never sold land on the particular street upon which the land is located,<sup>1</sup> yet it is clearly essential that he should be acquainted with the value of land in the vicinity of the property in question.<sup>2</sup> A speculator in real estate, who buys and sells real property for himself, is competent to testify as to value, provided he is conversant with the property in question, and with other property of the same character in the vicinity, and knows at what prices such property is held by persons owning and controlling it.<sup>3</sup>

2. But one does not need to be a dealer in real estate in order to be qualified to testify as to the value of it.<sup>4</sup> The market value of land is not a question of science or skill upon which only experts can express opinions.<sup>5</sup> The opinions of ordinary witnesses are certainly admissible on this as on other questions of value, notwithstanding a decision to the contrary in the Supreme Court of Rhode Island.<sup>6</sup> The rule is that residents in the immediate vicinity, who are acquainted with the property in question, and know the value of the land in that neighborhood, are competent to testify concerning its value. Thus, a farmer residing in the vicinity of farming

<sup>1</sup> *Bristol County Savings Bank v. Keavy*, 128 Mass. 298.

<sup>2</sup> *Haulenbeck v. Cronkright*, 23 N. J. Eq. 413.

<sup>3</sup> *Jarvis v. Furman*, 25 Hun (N. Y.), 393.

<sup>4</sup> *Huff v. Hall*, 56 Mich. 456.

<sup>5</sup> *Pennsylvania, etc. R. R. Co. v. Bunnell*, 81 Pa. St. 426.

<sup>6</sup> *Buffum v. N. Y., etc. R. R. Co.*, 4 R. I. 221, 224.



lands, who was acquainted with the situation and quality of the land in question, and who stated that he knew its value, has been held competent to express his opinion concerning its value, although he had not been engaged in buying or selling land, and his opinion was not based upon actual sales of that or similar land.<sup>1</sup> The courts are practically unanimous in following the rule above stated, that residents in the immediate neighborhood, who are acquainted with the value of property in that vicinity and who know the property in question, are qualified to testify as to its value.<sup>2</sup> It is not necessary that the witness should have bought or sold land in that vicinity,<sup>3</sup> or should have known of actual sales of such tracts as the one in question,<sup>4</sup> that his knowledge of sales should have been personal,<sup>5</sup> or

<sup>1</sup> *Kansas City, etc. R. R. Co. v. Ehret*, 41 Kan. 22; *Kansas City, etc. R. R. Co. v. Baird*, 41 Kan. 69; *Leroy, etc. R. R. Co. v. Hawk*, 39 Kan. 638; *Kansas City, etc. R. R. Co. v. Allen*, 24 Kan. 33.

<sup>2</sup> *Wallace v. Finch*, 24 Mich. 255; *Stone v. Covell*, 29 Mich. 362; *Thomas v. Mallinekrodt*, 43 Mo. 65; *Pennsylvania, etc. R. R. Co. v. Bunnell*, 81 Pa. St. 426; *Robertson v. Knapp*, 35 N. Y. 91; *Snyder v. Western Union R. R. Co.*, 25 Mo. 60; *West Newbury v. Chase*, 5 Gray (Mass.), 421; *Clark v. Baird*, 9 N. Y. 183; *Lehmicke v. St. Paul, etc. R. R. Co.*, 19 Minn. 464; *Simmons v. St. Paul, etc. R. R. Co.*, 18 Minn. 184; *Crouse v. Holman*, 19 Ind. 30; *Brainard v. Boston, etc. R. R. Co.*, 12 Gray (Mass.), 407; *Hayes v. Ottawa, Oswego, etc. R. R. Co.*, 54 Ill. 373; *Galena, etc. R. R. Co. v. Haslem*, 73 Ill. 494; *Wallace v. Finch*, 24 Mich. 255; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 284; *Keithsburg, etc. R. R. Co. v. Henry*, 79 Ill. 290; *Selma, etc. R. R. Co. v. Keath*, 53 Ga. 178; *Hudson v. State*, 61 Ala. 334; *Milwaukee, etc. R. R. Co. v. Eble*, 4 Chand. (Wis.) 72; *Erd v. Chicago, etc. R. R. Co.*, 41 Wis. 64; *Ferguson v. Stafford*, 33 Ind. 162; *Tate v. M., K. & T. R. R. Co.*, 64 Mo. 149; *Russell v. Horn Pond, etc. R. R. Co.*, 4 Gray (Mass.), 607; *Northeast, etc. R. R. Co. v. Frazier*, 25 Neb. 53; *Pingery v. Cherokee, etc. Ry. Co.*, 78 Iowa, 439; *Blakey. Griswold*, 103 N. Y. 429.

<sup>3</sup> *Whitman v. Boston, etc. R. R. Co.*, 7 Gray (Mass.), 313; *Lehmicke v. St. Paul, etc. R. R. Co.*, 19 Minn. 464, 482.

<sup>4</sup> *Frankfort, etc. R. R. Co. v. Windsor*, 51 Ind. 240; *Leroy, etc. R. R. Co. v. Hawk*, 39 Kan. 638, 641; *Kansas City, etc. R. R. Co., Ehret*, 41 Kan. 22; *Kansas City, etc. R. R. Co. v. Baird* 41 Kan. 69.

<sup>5</sup> *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 284.

that it should have been derived from the buyer or seller of the land sold.<sup>1</sup>

It has been held in Rhode Island that while a farmer living in the vicinity of farming land, and familiar with it, may, as an expert, give his estimate of its value as *farm* land, yet that his opinion generally of the value of such realty would be inadmissible, since the market value of such realty might be much greater than its agricultural value.<sup>2</sup>

Where it was desired to show a depreciation in the value of certain real property, it was held that the secretary of an insurance company, who had been in the habit of examining buildings in reference to insurance, might express the opinion that the passage of locomotive engines within a certain distance of a building would diminish the rent and increase the rate of insurance against fire, and that he might state that his company had declined to take the risk at any rate of insurance on applications for insurance on buildings in that vicinity.<sup>3</sup>

The Supreme Court of Pennsylvania in a well considered case has stated the law as to the competency of witnesses in this class of cases, as follows: "In order, therefore, that a witness may be competent to testify intelligently as to the market value of land, he should have some special opportunity for observation, he should, in a general way, and to a reasonable extent, have in his mind the *data* from which a proper estimate of value ought to be made; if interrogated he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in condition to know what he proposes to state

<sup>1</sup> *Whitman v. Boston, etc. R. R. Co.*, 7 Gray (Mass.), 313.

<sup>2</sup> *Brown v. Providence, etc. R. R. Co.*, 12 R. I. 238.

<sup>3</sup> *Webber v. Eastern R. R. Co.*, 2 Met. (Mass.) 147.

and to enable the jury to judge of the probable proximate accuracy of his conclusions. He may hesitate in making an estimate of the value, he may say that he does not know certainly, but, after due deliberation, may be able to express an opinion, or come to a conclusion, the accuracy of which, under all the evidence, is of course wholly for the jury.”

And the following statement has been made by the Supreme Court of Massachusetts: “The knowledge requisite to qualify a witness to testify to his opinion of the value of lands may either be acquired by the performance of official duty, as by a county commissioner or selectman, whose duty it is to lay out public ways, or by an assessor, whose duty it is to ascertain the value of lands for the purpose of taxation; or it may be derived from knowledge of sales and purchases of other lands in the vicinity, either by the witness himself, or by other persons.”<sup>1</sup> While witnesses testifying to value have a right to give their opinion based upon actual sales known by them to have been made,<sup>2</sup> yet it is ordinarily held that evidence of particular sales is inadmissible to establish the market value of land.<sup>3</sup> To allow such evidence to be introduced is to raise an issue collateral to the subject of inquiry, for a particular sale may have been a sacrifice occasioned by necessity, or it may have been the result of caprice or folly. But in some States evidence of actual sales of neighboring property is held admissible.<sup>4</sup>

<sup>1</sup> *Pittsburg, etc. R. R. Co. v. Vance*, 115 Pa. St. 325.

<sup>2</sup> *Swan v. Middlesex*, 101 Mass. 177.

<sup>3</sup> *Thompson v. Moiles*, 46 Mich. 42.

<sup>4</sup> *Pittsburg, etc. R. R. Co. v. Patterson*, 107 Pa. St. 461; *Selma R. R. v. Keith*, 53 Ga. 178; *Lehmiecke v. St. Paul, etc. R. R. Co.*, 19 Minn. 464; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247.

<sup>5</sup> *Edmonds v. Boston*, 108 Mass. 535; *Moale v. Baltimore*, 5 Md. 314.



The market value of land is not necessarily the price which the land would command in a forced sale by public auction; but it is estimated "upon a fair consideration of the location of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood at the time. The price which, upon full consideration of the matters stated, the judgment of well informed and reasonable men will approve may be regarded as the market value."<sup>1</sup> The market value of land is not to be determined by combining the several values of its constituent parts and aggregating the whole. For instance, one cannot say that the timber on the land is worth a certain amount, the gravel so much, a deposit of clay so much, and when these are removed the land is still worth so much; and therefore that the land is worth the aggregate of all these sums. Such an estimate is considered unfair and misleading, and as confusing the real question as to what is the market value of the land as it is. The witnesses in stating their opinion are entitled to take into account whatever goes to make up value, but in their estimate they should give their opinion of the market value of the whole, and not of the several parts.<sup>2</sup> The testimony would be inadmissible to show, for instance, how many building lots, the land in question could be divided into, and what such lots would be worth separately. It is the tract and not the lots into which it might be divided that is to be valued.<sup>3</sup> A witness testifying

<sup>1</sup> *Pittsburg, etc. R. R. Co. v. Vance*, 115 Pa. St. 325.

<sup>2</sup> *Page v. Wells*, 37 Mich. 415.

<sup>3</sup> *Pennsylvania, etc. R. R. Co. v. Cleary*, 125 Pa. St. 443.

as to the value of a tract of land may, however, base his estimate upon the value of other tracts in the neighborhood.<sup>1</sup>

§ 156. **Value of Personal Property Generally.—**

When the question is as to the market price or value of goods and chattels, the opinions of merchants and others conversant in trade, and who know the value of that kind of property, are received in evidence. The experience which merchants and brokers acquire in the ordinary conduct of their business is such as qualifies them to testify as to the value of articles with which they are required by the necessities of their business to be familiar.<sup>2</sup> Thus, when the question was as to the value of materials for making clothing, a manufacturer of clothing has been permitted to state his opinion.<sup>3</sup> So when the question was as to the value of material and labor employed in erecting a house, master builders have been allowed to give their opinion.<sup>4</sup> In like manner the opinions of carpenters have been received as to the value of a house which had been destroyed by fire.<sup>5</sup> The opinion of a clerk employed in a store in selling goods has been received as to the value of goods,<sup>6</sup> and a workman in a saw mill, familiar with the prices of lumber at the mill, has been allowed to testify as to the value of particular lumber cut in the neighborhood and taken there for manufacture. If in the course of their business dealers are kept informed as to the market value of any particular thing by price current lists duly furnished them

<sup>1</sup> *Morrison v. Watson*, 101 N. C. 338.

<sup>2</sup> *Reed v. New*, 35 Kan. 727.

<sup>3</sup> *Browning v. Long Island R. R. Co.*, 2 Daly (N. Y.), 117.

<sup>4</sup> *Tebbetts v. Haskins*, 16 Me. 288.

<sup>5</sup> *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367.

<sup>6</sup> *Sirrinc v. Briggs*, 31 Mich. 443.

for use in their business, opinions derived from such information will be received in evidence.<sup>1</sup> But in an action for work and labor done and materials furnished, it has been held that the price-list itself could not be received in evidence.<sup>2</sup> And it has been held that no error was committed in excluding the testimony of a witness, whose knowledge as to market price was derived wholly from statements of his partner as to the prices at which his firm had sold, entries of which it was his duty to make in the books of the firm.<sup>3</sup>

§ 157. **Value of Services Generally.**—The general rule is that it is competent for a witness to state the value of another's services in all cases where he has knowledge of the matter in controversy, and is acquainted with the value of services such as those rendered in the particular case.<sup>4</sup> For instance, an expert accountant may testify as to what would be a fair compensation for the services of a competent accountant in keeping the account books of a business of a certain character, and as to the usual charge per day for the services of an accountant in fixing up complicated accounts.<sup>5</sup> And where the plaintiff, who was a real estate broker, sued for services rendered in effecting the purchase of a mill, the

<sup>1</sup> *Whitney v. Thatcher*, 117 Mass. 526; *In re Cliquot's Champagne*, 3 Wall. (U. S.) 114; *In re Fennerstein's Champagne*, *Ibid.* 145; *Sisson v. Toledo*, etc. R. R. Co., 14 Mich. 489; *Cleveland*, etc. R. R. Co. v. *Perkins*, 17 Mich. 296; *Sirrine v. Briggs*, 31 Mich. 443; *Lush v. Druse*, 4 Wend. (N. Y.) 317; *Terry v. McNeil*, 58 Barb. (N. Y.) 241. See *Whelan v. Lynch*, 60 N. Y. 469, and *Schmidt v. Herfurth*, 5 Robertson (N. Y.), 124, 125.

<sup>2</sup> *County of Cook v. Harms*, 10 Bradw. (Ill.) 24.

<sup>3</sup> *Flynn v. Wohl*, 10 Mo. App. 582.

<sup>4</sup> *Bowen v. Bowen*, 74 Ind. 470; *Johnson v. Thompson*, 72 Ind. 167; *Parker's Heirs v. Parker's Admr.*, 33 Ala. 459; *Stone v. Tupper*, 58 Vt. 409.

<sup>5</sup> *Shattuck v. Train*, 116 Mass. 296.



evidence of a real estate broker was held admissible as to the commissions which he charged for such services, and as to what he would have charged in the case in question.<sup>1</sup>

But if the witness is unacquainted with the value of services such as those rendered in the particular case, he is not an expert in that particular matter of inquiry, and cannot testify as such. Hence, in a suit by a broker to recover commissions for the sale of a colliery, a broker whose business was the sale of real estate in Philadelphia, and who had no experience and knew of no sales or commissions paid on sales of collieries, was held to be an incompetent witness as to the value of the services rendered.<sup>2</sup>

Employers of labor are competent to testify as to the value of the services of one in like employment. Thus, in an action brought for services in planning, preparing and organizing for the erection of a factory, and in superintending the mounting and putting in operation of its machinery, the Supreme Court of Georgia has permitted witnesses, who were not experts, and who knew nothing of the particular services sued for, except from a general description of the same contained in the interrogatories in answer to which their evidence was given, to testify as to what in their opinion would be a reasonable salary for the services performed. The court held that witnesses who had employed the person rendering the services, or who had been employed with him, and who had seen the results of his skill, and who knew his professional standing, could testify in such cases.<sup>3</sup> So it has been held that neighbors, who had employed serv-

<sup>1</sup> *Elting v. Sturtevant*, 41 Conn. 176.

<sup>2</sup> *Potts v. Aechternacht*, 93 Pa. St. 142.

<sup>3</sup> *Eagle, etc. Manufacturing Co. v. Brown*, 58 Ga. 240.

ants to do like work, are competent to testify to the value of services of a girl employed to do housework,<sup>1</sup> and that the value of the services of a farm laborer may be shown by the testimony of those who had employed him.<sup>2</sup>

The admission of the opinion of a witness living in one place as to the value of services performed at another was held no error, when there was nothing to show that the witness did not know the value of labor at the latter place, or the comparative value of wages at both.<sup>3</sup>

§ 158. **The Value of Legal Services.**—According to the common law of England the reward of an advocate's services were deemed, not *merces*, but *honoraria*, and could not be recovered by means of legal proceedings.<sup>4</sup> But in this country the English rule does not prevail, and a right of action exists for the recovery of counsel fees.<sup>5</sup> In the absence of some express contract fixing the amount of the attorney's compensation, if an action is instituted to enforce payment, it is necessary to determine the value of the services rendered, and in such an action an attorney may be called as an expert to testify as to the value of the services in question.<sup>6</sup> It has been well said, that "the

<sup>1</sup> Carter v. Carter, 36 Mich. 207.

<sup>2</sup> Ritter v. Daniels, 47 Mich. 617.

<sup>3</sup> Kent Furniture, etc. Co. v. Ransom, 46 Mich. 416.

<sup>4</sup> Kennedy v. Brown, 13 C. B. (N. S.) 677; 32 L. J. 137. And see Brown v. Kennedy, 33 L. J. Ch. 71; 33 Beav. 133; 4 D. J. & S. 217.

<sup>5</sup> See 13 Cent. L. J. 43, where the subject is considered and the cases collected. The English rule, however, is still recognized in New Jersey. Seeley v. Brown, 15 N. J. L. 35; Van Atta v. McKinney, 16 N. J. L. 235; Schoup v. Schenck, 40 N. J. L. 195. And counsel fees in that State cannot be recovered unless an express contract fixing the fees is shown. Hopper v. Luellum, 41 N. J. Law, 182 (1879).

<sup>6</sup> Harnett v. Garvey, 66 N. Y. 641; Williams v. Brown, 28 Ohio St. 547, 551; New Orleans, etc. R. R. Co. v. Albreton, 38 Miss. 242, 246, 273;

very best means of adjusting this value are the opinions of those who, in earning and receiving compensation for them, have learned what legal services in their various grades are worth."<sup>1</sup> The opinion of one who is not an attorney is incompetent to prove the value of an attorney's services.<sup>2</sup> But it does not seem to be necessary that the attorney should be at the time, actually engaged in the active practice of his profession.<sup>3</sup> The witness may base his opinion in part on his personal knowledge, and in part on the testimony of others;<sup>4</sup> and if he has no personal knowledge of the services rendered, his testimony must be based upon a hypothetical question submitted to him.<sup>5</sup> In determining the value of the attorney's services, it is proper to show by the witness, the character and professional standing of the person rendering the services in question<sup>6</sup> as well as the nature and importance of the services rendered.<sup>7</sup> And it is proper to propound the following inquiry: "From the character of the case set out in the complaint filed, what would be a reasonable fee for defending said suit?"<sup>8</sup> The value of the services of counsel under circumstances of general similarity to

*Allis v. Day*, 14 Miss. 516; *Anthony v. Stinson*, 4 Kan. 211; *Ottawa University v. Parkinson*, 14 Kan. 159; *Head v. Hargrave*, 105 U. S. 45; *Llussman v. Merkle*, 3 Bos. (N. Y.) 402; *Beekman v. Platner*, 15 Barb. (N. Y.) 550; *Jevne v. Osgood*, 57 Ill. 340; *Haish v. Payson*, 107 Ill. 365; *Turnbull v. Richardson*, 69 Mich. 400; *Kelley v. Richardson*, 69 Mich. 430.

<sup>1</sup> *Thompson v. Boyle*, 85 Pa. St. 477.

<sup>2</sup> *Hart v. Vidal*, 8 Cal. 56.

<sup>3</sup> See *Blizzard v. Applegate*, 61 Ind. 371.

<sup>4</sup> *Garfield v. Kirk*, 65 Barb. (N. Y.) 464; *Brown v. Huffard*, 69 Mo. 305.

<sup>5</sup> *Williams v. Brown*, 28 Ohio St. 547, 551; *Central Branch, etc. R. R. Co. v. Nichols*, 24 Kan. 242.

<sup>6</sup> *Jackson v. N. Y. Cent., etc. R. R. Co.*, 2 Sup. Ct. 653.

<sup>7</sup> *Harland v. Lilienthal*, 53 N. Y. 438; *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

<sup>8</sup> *Covey v. Campbell*, 52 Ind. 158.



those under which the services in question were rendered may also be shown.<sup>1</sup> But what an attorney receives in a case is no criterion of the value of the service of another attorney in the same case, in the absence of any showing that the services were similar, the skill equal, and the time spent the same.<sup>2</sup> It has been held that, upon the cross-examination of an attorney testifying as an expert in such cases, it is within the discretion of the trial court to reject a question as to the income derived by the witness from the practice of his profession.<sup>3</sup>

An important question concerning the value of an attorney's services recently came before the Supreme Court of Michigan, in the case of *Kelley v. Richardson*,<sup>4</sup> and was decided by three judges to two. Richardson died possessed of property aggregating over a million of dollars, all of which he left by will to his wife. The plaintiff was employed by the widow to attend to the probating of the will and the settlement of the estate. He had the entire counseling and managing of the estate, which included a lumbering plant, composed of a saw-mill and equipments valued at half a million of dollars. He spent five months in settling the estate and then brought suit to recover the value of his services. On the trial he put on the stand certain lawyers, stated in a hypothetical question to them the nature of the services rendered, and asked their opinion as to the value of the services rendered. Objection was made to the question on the ground that it called for the opinion of lawyers as to the value of services not alone profes-

<sup>1</sup> *Thompson v. Boyle*, 85 Pa. St. 447.

<sup>2</sup> *Ottawa University v. Parkinson*, 14 Kan. 160.

<sup>3</sup> *Harland v. Lilienthal*, 53 N. Y. 438.

<sup>4</sup> 69 Mich. 430. See also *Turnbull v. Richardson*, 69 Mich. 400.

sional, but business services in carrying on a lumber business, and a saw-mill, which manufactured 20,000,000 feet of lumber per year, and the running of eleven steam and sail vessels on the lakes, and various other services, concerning the value of which a lawyer, as such, was not competent to testify. The majority of the court held that the opinions expressed by the lawyers concerning the value of the services as an entirety were properly received, and Mr. Justice Campbell said: "It seems to us that when a lawyer is employed professionally to take entire charge of matters involving at the same time professional services, and services which are not so strictly special that others than lawyers might not perform them, it is impossible to draw any line and say that he is not employed professionally throughout." On the other hand, the minority of the court thought the services rendered in managing the business enterprises could not be considered as having been rendered in a professional capacity, and that the opinions of the lawyers as to the value of such services were inadmissible, it not appearing that they knew anything about running a farm, a saw-mill, or a steam-boat. Mr. Chief Justice SHERWOOD, in his dissenting opinion, regards the rulings of the majority of the court in this case "as breaking down all the wholesome barriers between expert and non-expert testimony."

§ 159. **The Value of Services Rendered by Physicians and Nurses.**—In a case decided as early as 1791, Lord KENYON declared that he understood that the fees of physicians and surgeons were merely honorable and not demandable of right.<sup>1</sup> And such was

<sup>1</sup> Chorley v. Bolcot, 4 Term R. 317.

undoubtedly the law of England.<sup>1</sup> In this country, however, the courts have not recognized the English rule, but have allowed physicians to recover the value of their services.<sup>2</sup> This right is now secured to them in England by a statute adopted in 1858.<sup>3</sup>

As the value of services rendered by lawyers is shown by the testimony of those engaged in the same profession, so the value of services rendered by physicians and surgeons in the practice of their profession is proven by the testimony of their professional brethren.<sup>4</sup> And it has been laid down that one who is not a physician is incompetent to testify as to the value of medical services.<sup>5</sup> The Indiana court has held it not necessary that the witness should know just what physicians were in the habit of charging for services similar to those in question, and for what such services could be procured.<sup>6</sup> In

<sup>1</sup> *Lipscombe v. Holmes*, 2 Camp. 441.

<sup>2</sup> *Judah v. McNamee*, 3 Blackf. (Ind.) 269; *Mooney v. Lloyd*, 5 S. & R. (Penn.) 416; *Rouse v. Morris*, 17 S. & R. (Penn.) 328; *Simmons v. Means*, 8 S. & M. (Miss.) 397; *Mock v. Kelly*, 3 Ala. 387; *Smith v. Watson*, 14 Vt. 332.

<sup>3</sup> 21 and 22 Vict. Ch. 90, § 31. See, too, *Gibbon v. Budd*, 32 L. J. Ex. 182; s. c., 2 H. & C. 92.

<sup>4</sup> *Board of Commissioners v. Chambers*, 75 Ind. 409; *Mestz v. Detwiler*, 8 W. & S. 376; *Wood v. Barker*, 49 Mich. 295.

<sup>5</sup> *Mock v. Kelly*, 3 Ala. 387. And see *Wood v. Brewer*, 57 Ala. 515.

<sup>6</sup> *Board of Commissioners v. Chambers*, 75 Ind. 409. In this connection it is interesting to note the language of the Supreme Court of Minnesota in *Elfelt v. Smith*, 1 Minn. 126: "The value of services upon a *quantum meruit* stands in regard to the proof, upon the same principle as to the value of chattels upon a *quantum valebant*. The value of chattels in such a case is always regulated by the usual market value of such chattels, of like quality, at the time and place of sale; and before a witness can, in such a case, be permitted to testify to such value, it must appear by his own, or other competent evidence, that he knows with reasonable certainty what such usual or market value is. He then testifies to the value as a fact, and not as a mere matter of opinion. So in regard to service; it must appear that the witness knows the usual value of, or rate of compensation paid for such or the like services at the time



that case the facts were as follows: Certain physicians were called to testify as to the value of the services of a physician in making a *post-mortem* examination under the employment of a coroner. The witnesses testified on their direct examination that they were physicians and surgeons, and considered themselves competent to testify as to the value of services rendered in making *post-mortem* examinations. But it appeared on their cross-examination that they did not know what physicians had charged for making such examinations, and that they knew nothing of the prices at which such services could be procured, but formed their judgment of the value of the services from what they thought such services would be worth. The court held it proper that their testimony should be received, saying: "The testimony was competent, for the witnesses were shown to be experts, and to possess such knowledge, skill and acquaintance with the subject under investigation as entitled them to express their opinions to the jury. They may have had some knowledge of the value of such services, without knowing anything at all about what others were charging for like services."

In an action by a physician to recover for medical services, it is competent for him to prove the nature of the disease, and the character of the treatment given; and one court in New York has held that such evidence is not rendered incompetent by the provision of the statute, forbidding the disclosure of confidential communications made by a patient to a physician.<sup>1</sup>

when, and the place where, they were rendered, before he can be properly permitted to testify what such value or rate is."

<sup>1</sup> Kendall v. Gray, 2 Hilton (N. Y.), 302.

As to the value of services rendered in nursing and caring for the sick, the rule is that the witnesses should be persons who have had experience in nursing and caring for the sick. Physicians<sup>1</sup> and nurses<sup>2</sup> are competent witnesses in such cases. And it has been held that one who had long had the care of an insane person, and provided for his table, and who had been for a considerable period of time in another family while such person was boarding there, was qualified to express an opinion as to the value of taking care of him and boarding him at the latter place.<sup>3</sup>

§ 160. **Value of Annuities.** — Stockbrokers who have been engaged in buying and selling life annuities, and who have thereby become acquainted with the value and market price of annuities, have been allowed to testify as to the market price of an annuity for the life of a person of a certain age.<sup>4</sup> So, actuaries, experienced in the business of life insurance, are permitted to testify as to the value of an annuity.<sup>5</sup> And an accountant, who was acquainted with the business of insurance companies, has been examined as to the average duration of human lives.<sup>6</sup> With the view of ascertaining the probable duration of a particular life at a given age, it is material to know

<sup>1</sup> Woodward v. Bugsbee, 4 N. Y. Sup. Ct. 393; Reynolds v. Robinson, 64 N. Y. 589; Shafer v. Dean's Admr., 29 Iowa, 144.

<sup>2</sup> Shafer v. Dean's Admr., 29 Iowa, 144.

<sup>3</sup> Kendall v. May, 10 Allen (Mass.), 59.

<sup>4</sup> Heathcote v. Paignon, 2 Brown's Ch. 167, 169.

<sup>5</sup> *Ex parte* Whitehead, 1 Merivale, 127, 128; *Ex parte* Thistlewood, 19 Vesey, 235; Heathcote v. Paignon, 2 Brown's Ch. 167, 169; Griffith v. Spratley, 1 Cox Ch. 389.

<sup>6</sup> Rowley v. London, etc. R. R. Co., 8 Ex. (L. R.) 221. In the case cited, Brett, J., did not think it necessary to say whether such a witness was competent, but thought it doubtful, as he was not an actuary. Blackburn, J., said that as he gave evidence that he was experienced in the business of life insurance, his opinion was admissible.

what is the average duration of the life of a person of that age. "The particular life on which an annuity is secured may be unusually healthy, in which case the value of the annuity would be greater than the average, or it may be unusually bad, in which case the value would be less than the average; but it must be material to know what, according to the experience of insurance companies, the value of an annuity secured on an average life of that age would be." For the purpose of determining this, the witnesses are permitted to refer to standard tables used by insurance companies in the course of their business.<sup>1</sup> And it has been held that the Carlisle Tables of Mortality, being standard tables on this subject, are admissible evidence for the purpose of showing the expectation of life at a particular age.<sup>2</sup> The Northampton Tables have been received for the same purpose.<sup>3</sup> And in a recent case in Kentucky, in determining the value of the potential right of dower, the court adopted the table prepared by Professor Bowditch on that subject, declaring that it furnished a safer and more convenient guide than the opinions of witnesses.<sup>4</sup> This subject is considered more fully in another portion of this work.<sup>5</sup>

For the purpose of determining the value of the life of a decedent, an expert may be asked: "From your knowledge of the decedent's age, habits, health, and physical condition," how long, in your

<sup>1</sup> See *Davis v. Marlborough*, 2 Swanson, 113, 150; *Nicholas v. Gould*, 2 Vesey, 423; *Rowley v. London*, etc. R. Co., *supra*.

<sup>2</sup> *Donaldson v. Mississippi*, etc. R. R. Co., 18 Iowa, 281; *Simonson v. C., R. I. & P. R. Co.*, 49 Iowa, 87.

<sup>3</sup> *Schell v. Plumb*, 55 N. Y. 598; *Sauter v. N. Y. Cent. R. R. Co.*, 13 N. Y. Sup. Ct. 451; *Wager v. Schuyler*, 1 Wend. (N. Y.) 553; *Jackson v. Edwards*, 7 Paige Ch. (N. Y.) 386, 408.

<sup>4</sup> *Lancaster v. Lancaster's Trustees*, 78 Ky. 200.

<sup>5</sup> See section 163.



opinion, would he have been useful to his family?<sup>1</sup> An expert in life insurance may be asked as to the relative hazard of different occupations.<sup>2</sup>

§ 161. **Value of Foreign Currency and Negotiable Securities.**—In order to ascertain what is the lawful money of a foreign country it is considered unnecessary that the law of such country, regulating the subject, should be produced.<sup>3</sup> And witnesses who have had business transactions in such country, having had occasion in that way to learn the value of the currency in common use, are competent to testify as to such value, and to state its equivalent in our own currency.<sup>4</sup> So it has been held that the value of the stock of a railroad company at a specified date, could be shown by the testimony of one who dealt in such stock at or near that date.<sup>5</sup> And it has even been held that the testimony of a witness as to the market value, at a somewhat remote period of negotiable securities, was competent and sufficient *prima facie* evidence, although it was founded on a general recollection based on his keeping the run of the market price in consequence of being very much interested in the company which issued the securities.<sup>6</sup>

<sup>1</sup> Pennsylvania Railroad Co. v. Henderson, 51 Pa. St. 320.

<sup>2</sup> Hartman v. Keystone Ins. Co., 21 Pa. St. 478.

<sup>3</sup> Comstock v. Smith, 20 Mich. 338.

<sup>4</sup> Kermott v. Ayer, 11 Mich. 181; Comstock v. Smith, *supra*.

<sup>5</sup> Noonan v. Ilsley, 22 Wis. 27.

<sup>6</sup> Smith v. Frost, 42 N. Y. Superior Ct. 87.

## CHAPTER IX.

THE RELATION OF SCIENTIFIC BOOKS TO EXPERT  
TESTIMONY.

## SECTION.

162. The Relation of Scientific Works to Expert Testimony.
163. The Admissibility in Evidence of Certain Scientific Works.
164. The Inadmissibility in Evidence of Opinions and Statements Contained in Standard Treatises on Inexact Sciences—The Rule in England.
165. Their Admissibility in Some States of this Country.
166. Their Inadmissibility in Evidence is the General Rule in the United States.
167. Their Inadmissibility in California.
168. Their Inadmissibility in Illinois, Indiana and Kansas.
169. Their Inadmissibility in Maine, Maryland and Massachusetts.
170. Their Inadmissibility in Michigan and Mississippi.
171. The Doctrine in New Hampshire and New York.
172. Their Inadmissibility in North Carolina and Rhode Island.
173. Their Inadmissibility in Wisconsin.
174. The Reasons Why Such Books Should not be Received in Evidence.
175. Views of Writers on Medical Jurisprudence on the Question.
176. Their Inadmissibility for Purposes of Contradiction.
177. The Rights of the Witness to Refer to, or Cite Standard Authorities.
178. Reading from Authorities and Asking the Witness Whether he Agrees with the Extracts Read.
179. Reading from Scientific Books in Argument.
180. The Rule in England on the Subject.
181. Cases in the United States Denying to Counsel the Right to Read in Argument from Scientific Books.
182. Cases Sometimes Cited as Supporting the Rights of Counsel so to Do.

183. Cases Deciding that Counsel may Read from Scientific Books in Argument.
184. Reading the Testimony of Experts as Contained in Official Reports.

§ 162. **The Relation of Scientific Works to Expert Testimony.**—As we have already seen,<sup>1</sup> experts are permitted to express opinions on subjects connected with their particular departments of science, or of art, although their opinions are based on information derived by them from the study of books, and not from their own experience or observation of like cases. They are also permitted to refresh their memories by the use of standard authorities.<sup>2</sup> But a marked distinction exists between permitting a witness to refresh his memory by reference to an authority or writing, and the introduction of the writing itself in evidence. It may be wholly improper that the writing should be introduced in evidence, and yet entirely proper for the witness to refresh his recollection by a reference to it. An equally well-marked distinction exists between the admissibility of opinions based on a study of authorities, of standard writings, and the reception of the writings themselves in evidence. It is fair to assume that the expert has weighed the assertions and opinions of the different authorities, and that he has reached an independent judgment thereon. The opinion which he expresses is given in a court of justice, and under the solemnity of an oath. While it can hardly be presumed that a standard writer would give expression in his public writings to a dishonest opinion, yet the fact remains that the opinion was not

<sup>1</sup> See section 19.

<sup>2</sup> Taylor on Evidence, 1230; 1 Wharton's Ev. 438; Hoffman v. Click 77 N. C. 555.



expressed under oath, and may have subsequently been modified. The writer is not presented in court; no opportunity is given for his cross-examination, and the jury cannot observe the witness. The question, therefore, arises, are scientific works admissible in evidence? Can the opinions of scientific writers, as expressed in their writings, be received in evidence as the opinions of experts, or must the writers themselves be called as witnesses, and give expression to their opinions under oath, in the presence of the court, the jury, and the parties? This is an important question to be presently considered.

§ 163. **The Admissibility in Evidence of Certain Scientific Works.**—Before proceeding to the consideration of the question suggested in the preceding section it is necessary to understand that there are certain scientific works to which the question alluded to in the preceding section does not relate, and concerning the admissibility of which in evidence no doubt exists. These are books that relate to the exact sciences, or such as by long use in the practical affairs of life have come to be recognized by all having occasion to use them as standard and unvarying authority in determining the action of such persons.<sup>1</sup> To this class belong almanacs, astronomical calculations, tables of logarithms, mortuary tables for estimating the probable duration of life at a given age, tables of weights and measures, and of currency, chronological tables, interest tables, and annuity tables. The rule is well established that standard tables of mortality may be received in evidence for the purpose of showing the expectation of life at a

<sup>1</sup> *Tucker v. Donald*, 60 Miss. 460, 470; *Gallagher v. Market St. Ry. Co.* 67 Cal. 13, 16.

particular age.<sup>1</sup> Other instances in which scientific tables and works have been received in evidence, may be briefly noticed. Thus, in a case in the Mayor's Court of New York, in the year 1816, it was held that tide-tables could be received for the purpose of showing that the time of high water at New York and New London was the same.<sup>2</sup> In a recent case in New York when the question was as to the grinding capacity of a certain quantity of water at a mill the capacity was ascertained from Leffel's tables. The court said: "We think the united acquiescence of mill-wrights in the accuracy of these tables, and in the results of computation founded upon them, may be treated as the common knowledge of the men of that profession, and their computations so made as competent evidence."<sup>3</sup>

It has been held, too, in this country, that a record of the weather, kept for a number of years at the State Insane Asylum, was competent evidence to prove the temperature of the weather on a given day included in such record.<sup>4</sup>

There are a few cases in which the admissibility of almanacs has been considered. The almanac is

<sup>1</sup> Vicksburg, etc. R. R. Co. v. Putnam, 118 U. S. 554; McKeigue v. City of Janesville, 68 Wis. 59; Donaldson v. Mississippi, etc. R. R. Co., 18 Iowa, 281; Schell v. Plumb, 55 N. Y. 598; Sauter v. N. Y. Cent. & H. R. R. Co., 13 N. Y. Sup. Ct. 451; Wager v. Schuyler, 1 Wend. (N. Y.) 553; Jackson v. Edwards, 7 Paige Ch. 386, 408; People v. Security Life Ins. Co., 78 N. Y. 114, 128; Berg v. Chicago, etc. R. R. Co., 50 Wis. 427; Mulcairns v. Janesville, 67 Wis. 24; Central Railroad v. Richards, 62 Ga. 306; McDonald v. Chicago, etc. R. R. Co., 26 Iowa, 124, 140; Rowley v. London, etc. R. R. Co., L. R. 8. Exch. 221. In Worden v. Humeston, etc. R. R. Co., 76 Iowa, 310, the Carlisle life-tables as found in the Encyclopedia Britanica were received. See Howell's (Mich.) Stat. p. 1048.

<sup>2</sup> Green v. Aspinwall, 1 City Hall Recorder, 14.

<sup>3</sup> Garwood v. N. Y. Central, etc. R. R. Co., 45 Hun, 128 (1887).

<sup>4</sup> De Armand v. Neasmith, 32 Mich. 231.

said to be a part of the law of England,<sup>1</sup> but the almanac which is a part of the law of England is the one annexed to the common Prayer Book,<sup>2</sup> and that contains nothing about the rising or setting of the sun.<sup>3</sup> While courts take judicial notice<sup>4</sup> of the time the sun or moon rises and sets on the several days of the year, they will allow an almanac to be introduced in evidence in cases when it becomes important to fix the time referred to. In a case in Maryland, where it was material to prove at what hour the moon rose on a certain night, the trial court, against objection, allowed Gruber's almanac to be received in evidence for the purpose of proving the fact in question. The Supreme Court held no error had been committed.<sup>5</sup> In Connecticut it was held no error to allow Beckwith's almanac to be received in evidence where the question was as to the hour of sun set on a given day.<sup>6</sup> And in the same way Jayne's almanac was introduced in evidence in New York to show the time of the rising of the moon.<sup>7</sup> But as these are matters of which the courts take judicial notice the almanacs thus received in evidence are not used strictly as evidence, but rather for the purpose of refreshing the memory of the court

<sup>1</sup> *Regina v. Dyer*, 6 Mod. 41.

<sup>2</sup> *Brough v. Perkins*, 6 Mod. 81.

<sup>3</sup> See *Tutton v. Darke*, 5 Hurl. & Norman, 647, 649.

<sup>4</sup> *People v. Cheeke*, 61 Cal. 404.

<sup>5</sup> *Munshower v. The State*, 55 Md. 11, 24. The court say: "An almanac forecasts with exact certainty planetary movements. We govern our daily life by reference to the computations which they contain. No oral evidence or proof which we could gather as to the hours of the rising or setting of the sun or moon could be as certain or accurate as that which we may obtain from such a source. Why, then, should not these computations, which are, after all, but parts of the ordinary computations of the calendar, be admitted as evidence?"

<sup>6</sup> *State v. Morris*, 47 Conn. 179.

<sup>7</sup> *Case v. Perew*, 46 Hun (N. Y.), 57.



and the jury. In a recent case in Pennsylvania counsel was allowed in his argument to the jury to refer to an almanac to show that a certain day of the month given in the testimony of a witness was a certain day of the week, though the almanac was not proved and put in evidence. It was not necessary to put it in evidence as judicial notice could be taken of it.<sup>1</sup> Courts take judicial notice of the days of the week.<sup>2</sup>

§ 164. **The Admissibility in Evidence of Opinion and Statements Contained in Standard Treatises on Inexact Sciences—Rule in England.**—It is evident that a distinction may properly be taken between standard works on exact sciences and similar works on inexact sciences, and that it does not necessarily follow that because the former are received in evidence that the latter should be likewise admitted. It remains, therefore, for us to consider whether or not the latter are admissible in evidence. Whether scientific treatises on inexact sciences may be received in evidence is a question which has generally been raised in cases where an effort has been made to introduce as evidence the opinions expressed in medical treatises. So far as England is concerned the question seems to be regarded as having been definitely settled against their admissibility in 1831 in the leading case of *Collier v. Simpson*.<sup>3</sup> The case was one of slander, a physician having been charged with prescribing improper medicines. The following is the report of the case:

“*Wilde*, Sergt., proposed to show that the pre-

<sup>1</sup> *Wilson v. Van Leer*, 127 Pa. St. 372.

<sup>2</sup> *McIntosh v. Lee*, 57 Iowa, 358; *Reed v. Wilson*, 41 N. J. Law, 29; *Railroad Co. v. Lehman*, 56 Md. 226.

<sup>3</sup> 5 Car & Payne, 73; s. c., 24 Eng. C. L. 219.

scriptions were proper, and the dose not too large; and wished to put in medical books of authority, to show what was the received opinion in the medical profession."

"*Tindal, C. J.*—I think I cannot receive medical books."

"*Whightman.*—When foreign laws are to be proved, it frequently happens that a witness produces a foreign law book, and states it to be a book of authority."

"*Tindal, C. J.*—Physic depends more on practice than law. I think you may ask a witness, whether in the course of his reading he has found this laid down."

"Sir H. Halford, the president of the college of physicians, was called. He stated that he considered the medicine proper, and that it was sanctioned by books of authority. He stated that the writings of Dr. Merriman and Sir Astley Cooper were considered of authority in the medical profession."

"*Bompas, Sergt.*—I submit that medical books cannot be cited—more especially those of living authors. Sir Astley Cooper and Dr. Merriman might be called."

"*Wilde, Sergt.*—I wish to show that these books are acted upon by persons in the medical profession."

"*Tindal, C. J.*—I do not think that the books themselves can be read; but I do not see any objection to your asking Sir Henry Halford his judgment and the grounds of it, which may be, in some degree, founded on books, as a part of his general knowledge."

§ 165. **Their Admissibility in Some States of this Country.**—The earliest case in the United States

recognizing the right to introduce medical treatises in evidence, so far as we have been able to discover, was decided in Iowa in 1848. In an action for malpractice, the defendant offered certain medical books in evidence which the experts had pronounced standard works. They were excluded by the trial court, but the Supreme Court, while conceding that the ruling of the lower court was in conformity to the prevailing decisions of the English courts, reversed the judgment. The court said: "Physicians, when testifying, are permitted to refer to medical authors, and to quote their opinions from memory. Being permitted to refer to and quote authors, we can see no good reason why they may not read the views and opinions of distinguished authors. The opinions of an author, as contained in his works, we regard as better evidence than the mere statement of those opinions by a witness, who testifies as to his recollection of them from former reading. Is not the latter *secondary* to the former? On the whole, we think it the safest rule to admit standard medical books as evidence of the author's opinions upon questions of medical skill or practice, involved in a trial. This rule appears to us the most accordant with well established principles of evidence."<sup>1</sup> The Iowa court has since adhered to this ruling, once in 1865,<sup>2</sup> and again in 1887,<sup>3</sup> when the court declared that it was not competent to ask a physician, on his examination-in-chief, what certain medical authorities taught, on a given point, adding: "But the works themselves were admissible in evidence, and they are the only competent

<sup>1</sup> Bowman v. Woods, 1 G. Green, 441, 445.

<sup>2</sup> Donaldson v. The Mississippi, etc. R. R. Co., 18 Iowa, 291.

<sup>3</sup> State v. Winter, 72 Iowa, 627.



evidence of what they teach.'" In a case decided in 1878, the same court held that a trial court had not been guilty of error in excluding from evidence a certain herd book, saying that "without some proof that its correctness was recognized by cattle breeders," it was clearly inadmissible.<sup>1</sup>

The question we are now considering was raised in Alabama in 1857, eight years after the Supreme Court of Iowa had decided that standard medical books could be admitted in evidence. In the Alabama case, an extract from a standard treatise on venereal diseases was offered in evidence for the purpose of showing that a certain venereal disease, when in its secondary or tertiary form, could not be communicated from one person to another by contact. The trial court received the evidence, and the Supreme Court of Alabama, following the lead of the Iowa court, held that no error had been committed, dismissing the English case of *Collier v. Simpson*, already referred to, with the remark, "that was a case at *nisi prius*, and passed off with little or no examination." The Alabama court thought that inasmuch as judges, in determining questions of law, had a right to consult standard legal authors, that a jury should have the benefit of the opinions of standard medical authors to enable them to reach sound conclusions on questions of medical science. "Can that be a sound rule which, in the determination of a question involved in one science, allows to the trying body the light shed upon it by the writings of its standard authors, and withholds such lights from controversies respecting all other sciences? We think not."<sup>2</sup> The conclusion thus reached has

<sup>1</sup> *Crawford v. Williams*, 48 Iowa, 247, 249.

<sup>2</sup> *Stondenmeier v. Williamson*, 29 Ala. 558, 565.

been adhered to since, once, in 1861,<sup>1</sup> and again in 1879.<sup>2</sup>

§ 166. **Their Inadmissibility in Evidence is the General Rule in the United States.**—Notwithstanding the opinions of a few of the State courts to the contrary, the general rule, as established by the weight of authority in this country, is that standard medical and scientific works are inadmissible in evidence as proof of the declarations or opinions which they contain. The rule, however, has its exceptions, to be considered later on. The question has now been raised so many times, and the current of authority is so strongly in that direction, that we feel justified in saying that a general rule has been established on this subject, and that it forbids the reception of such works in evidence. The rule in England and in the United States is one and the same in relation to the matter. The cases on the subject are for the most part very recent, and the wonder is that so important a question was not earlier brought to the attention of the courts and conclusively settled.

§ 167. **Their Inadmissibility in California.**—The Supreme Court of this State has decided that medical books are inadmissible in evidence. In a case before the court in 1882, Mr. Justice McKINSTRY stated that such books were not admissible as evidence.<sup>3</sup> The question, however, was not squarely presented in that case, and the opinion then expressed was only a *dictum*. But in 1885 the question was fairly before the court, and it was decided that in an action to recover damages for personal

<sup>1</sup> Merkle v. State, 37 Ala. 139.

<sup>2</sup> Bates v. State, 63 Ala. 30.

<sup>3</sup> People v. Wheeler, 60 Cal. 581, 584.

injuries, a medical book, although proved to be of standard authority, was inadmissible in evidence to prove the nature and probable effect of the injuries. The court held that such books were inadmissible both under the rule of the common law and under the California Code of Civil Procedure, which contained a provision making "historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, \* \* \* *prima facie* evidence of facts of general notoriety and interest." Construing this provision of the code the court said: "What are 'facts of general notoriety and interest?' We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause that, under the provisions of the code, proof may be made by the production of books of standard authority." Medicine is not one of the exact sciences, and is based on *data* which each successive year may correct and expand. What is considered a sound induction one year is liable to be considered an unsound one the next year, and medical books are altered in material features from edition to edition. It was, therefore, thought that such books should not be received in evidence.<sup>1</sup>

§ 168. **Their Inadmissibility in Illinois, Indiana and Kansas.**—Twenty years after *Collier v. Simpson* was decided in England, the question came up in

<sup>1</sup> *Gallagher v. Market St. Ry. Co.*, 67 Cal. 13.



Indiana, and the authority of that case was fully recognized and followed. The circumstances were as follows: It was proposed to have a physician testify as to the effects of poison upon the human system, his information being derived from standard medical treatises. Thereupon the objection was made that his evidence was not admissible, but that the authors themselves should be produced as witnesses, or if dead, that their books should be offered in evidence. The court held that the books could not be received, but that the opinions of a physician based on them were admissible.<sup>1</sup>

In 1885 the court was urged to adopt a different rule, counsel contending that the decision previously reached was "against reason and enlightened view of public justice." But this the court declined to do.<sup>2</sup>

In a case before the Supreme Court of Illinois in 1884, Mr. Justice SCHOLFIELD declares that "the weight of current authority is decidedly against the admission of scientific books in evidence before a jury, although in some States they are admissible."<sup>3</sup>

And so in a case before the Supreme Court of Kansas in 1886, that court also declares that, "although the courts are not uniform in their holdings upon the admissibility in evidence of medical and scientific books, the great weight of authority is that they cannot be admitted to prove the declarations or opinions which they contain."<sup>4</sup>

<sup>1</sup> Carter v. State, 2 Ind. 619.

<sup>2</sup> Epps v. State, 102 Ind. 539, 549.

<sup>3</sup> City of Bloomington v. Shrock, 110 Ill. 219, 221. See also Forest City Ins. Co. v. Morgan, 22 Ill. App. Ct. Rep., 199, 202 (1886).

<sup>4</sup> State v. Baldwin, 36 Kan. 2, 17.

§ 169. **Their Inadmissibility in Maine, Maryland and Massachusetts.**—The question was first considered in this country in the Supreme Court of Maine, and it is somewhat curious that the subject was disposed of in this State in the same year in which *Collier v. Simpson* was decided in England, and that a similar conclusion was reached in both cases, each court being ignorant of the ruling of the other. The question was carefully considered, and much stress was laid on the fact that the reception of such works would be to receive evidence not sanctioned by an oath, without any opportunity for cross-examination, which was justly deemed a matter of great importance in any search after truth. "The practice, if by law allowed, would lead to endless inquiries and contradictory theories and speculations. In a word, if one book is evidence, so is another, and if all are admitted, it is to be feared that the truth would be lost in the learned contest of discordant opinions."<sup>1</sup>

The rule that medical treatises are inadmissible in evidence was adopted in Maryland in 1873, when it was held that the rules prescribed by medical authors for making *post-mortem* examinations could not be received in evidence. It was said that if it was desired to show that an examination had not been made by the physicians in a skillful and proper manner, it could be done only through the testimony of witnesses competent to testify on that subject.<sup>2</sup> And the doctrine was broadly laid down that medical treatises could not be received to sustain or contradict an expert. The court has in a case lately decided held that a book entitled "The Principles

<sup>1</sup> *Ware v. Ware*, 8 Me. 42.

<sup>2</sup> *Davis v. State*, 38 Md. 15, 36.

and Practice of Life Insurance," containing the rules and modes of adjusting life insurance, was not admissible in evidence.<sup>1</sup>

In Massachusetts, too, it is evident that medical treatises are not admissible in evidence. Medical opinions cannot be laid before a jury "except by the testimony, under oath, of persons skilled in such matters."<sup>2</sup>

§ 170. **Their Inadmissibility in Michigan and Mississippi.**—In a case before the Supreme Court of Michigan in 1882 the court said: "The rule is acknowledged in this State that medical books are not admissible as a substantive medium of proof of the facts they set forth."<sup>3</sup> Subsequent cases in the same court show that such is the well recognized rule.<sup>4</sup> The same ruling was made in Mississippi in 1882 in a case involving a question as to the effect of paralysis on the human arm. It was held to be clearly inadmissible to introduce, as primary evidence, extracts from standard medical works.<sup>5</sup>

§ 171. **The Doctrine in New Hampshire and New York.**—In New Hampshire we have a *dictum* approving the rule excluding medical books from the jury.<sup>6</sup> In New York the question does not appear to have been ruled on in either the Court of Appeals or in the Supreme Court. The New York Superior

<sup>1</sup> Mutual Life Ins. Co. v. Bratt, 55 Md. 200.

<sup>2</sup> Chief Justice Shaw in Commonwealth v. Wilson, 1 Gray, 337 (1854). And see Ashworth v. Kittridge, 12 Cush. 194 (1853); Commonwealth v. Sturtivant, 117 Mass. 122, 139 (1875); Commonwealth v. Brown, 121 Mass. 69, 75 (1876); Commonwealth v. Marzynski, 149 Mass. 68 (1889).

<sup>3</sup> Pinney v. Cahill, 48 Mich. 584, 586.

<sup>4</sup> See People v. Hall, 48 Mich. 486; Marshall v. Brown, 50 Mich. 149; People v. Millard, 53 Mich. 63, 75, *et seq.* Also see Barrick v. City of Detroit, 1 Mich. N. P. 135.

<sup>5</sup> Tucker v. Donald, 60 Miss. 460, 470.

<sup>6</sup> Dole v. Johnson, 50 N. H. 452, 455 (1870).



Court, however, as early as 1858, laid down the rule that the matters alleged in standard treatises must be proved in the same manner as any other facts, and that the books themselves were no evidence of the truth of the assertions of fact contained in them.<sup>1</sup>

§172. **Their Inadmissibility in North Carolina and Rhode Island.**—The subject has been twice considered in North Carolina, and in each instance a conclusion was reached adverse to the admissibility of such treatises in evidence. It was first presented in 1854, and the conclusion was grounded upon the fact that the writers had not been sworn and could not be cross-examined.<sup>2</sup> It was again before the court in 1877, when much importance was attached to the fact that medicine is an inductive science, and that medical treatises are based on *data*, constantly shifting with new discoveries and more accurate observation. “The medical work which was a ‘standard’ last year becomes obsolete this year. Even a second edition of the work of the same author is so changed by the subsequent discovery and grouping together of new facts, that what appeared to be a logical deduction in the first edition becomes an unsound one in the next. So that the same author at one period may be cited against himself at another.”<sup>3</sup>

In holding such treatises inadmissible in Rhode Island, the court remarked that “scientific men are admitted to give their opinions as experts, because given under oath; but the book which they write containing them, are, for want of such an oath,

<sup>1</sup> *Harris v. Panama R. R. Co.*, 3 Bosw. 1, 18.

<sup>2</sup> *Melvin v. Easley*, 1 Jones’ Law, 338.

<sup>3</sup> *Huffman v. Click*, 77 N. C. 55.

excluded.”<sup>1</sup> It was said that such books were not rendered any the more admissible by the fact that the experts had read passages from them, to which in cross-examination they had been referred, and in relation to which they had answered questions. And counsel cannot read from them for the purpose of contradicting the experts.

§ 173. **Their Inadmissibility in Wisconsin.**—In a case decided in 1848, counsel had proposed to read to the jury certain standard medical works “as evidence, or by the way of instruction to the jury.” Objection was made, which the trial court sustained. “This is a matter,” said the Supreme Court, “generally within the discretion of the court, and, therefore, not a subject of a writ of error. In many cases, no doubt, it would be proper to allow books of science to be read, though generally, such a practice would lead to evil results.”<sup>2</sup>

But in a subsequent case the court overruled its earlier decision that the admissibility of such treatises was discretionary with the trial court; and, placing itself in line with the weight of authority on this subject, declared the rule to be that medical books could not be read to the jury as evidence, although such books had been shown by expert testimony to be standard works in the medical profession.<sup>3</sup> And this doctrine it has adhered to in a number of recent cases.<sup>4</sup>

§ 174. **The Reason Why Such Books should not be Received in Evidence.**—We have shown that the rule

<sup>1</sup> State v. O'Brien, 7 R. I. 336, 338.

<sup>2</sup> Luning v. State, 1 Chandler, 178.

<sup>3</sup> Stilling v. Town of Thorp, 54 Wis. 528.

<sup>4</sup> Boyle v. State, 57 Wis. 472; Soquet v. State, 72 Wis. 659; Krenziger v. Chicago, etc. R. R. Co., 73 Wis. 158.

that medical treatises are inadmissible in evidence is supported by the weight of authority. We also think that the rule is supported by the better reason, and that the cases which announce a contrary principle have been unwisely decided. As the objections to the receptions of such books in evidence have been concisely and forcibly stated by a distinguished writer in a manner that leaves nothing to be added, we adopt his language as follows: "In the first place, a sound induction last year is not necessarily a sound induction this year, and, as a matter of fact, works of this class, when they do not become obsolete, are altered, in material features, from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects. In the second place, if such books are admitted as a class, those which are compilations must be admitted as well as those which contain the result of original research; the purely speculative must come in side by side with the empirical; so that if such treatises are admitted at all, it will be impossible to exclude those which are secondary evidence of the facts they state. In the third place, such books, without expert testimony, cannot generally be pointed to the concrete case; with expert testimony, they become simply part of such testimony, and lose their independent substantive character as books.

"In the fourth place, the authors of such books do not write under oath, and hence the authorities on which they rest cannot be explored, nor their processes of reasoning tested.

"Lastly, such books are at best hearsay proof of



that which living witnesses could be produced to prove.”<sup>1</sup>

§ 175. **Views of Writers on Medical Jurisprudence on this Question.**—Some writers on medical jurisprudence have been inclined to disapprove and even to resent the exclusion of medical treatises from evidence. In Beck’s Medical Jurisprudence the learned author strenuously maintains the right of the professional witness to refer to medical treatises. He has manifestly fallen into error in laying down the following proposition :

“ In this country, I believe, the objection to medical books has never been made. There is scarcely a case of any note, where testimony has been required, in which frequent reference has not been made to medical works. They are quoted and commented on by the bench and bar, and by the professional witnesses.”<sup>2</sup>

Later writers on medical jurisprudence have taken a more just view of this question, and appreciate the reasonableness and justice of the rule. In Elwell’s Medical Jurisprudence we find that distinguished writer saying: “the medical witness, therefore, has no just grounds of complaint, because his books are not received in evidence. The court honors his individual opinion as of higher value than that of an outside author. The court presumes, that from reading these authors, close thought and actual observation and experience, the witness, under oath, subject to cross-examination, will more certainly enlighten the case than if it depends upon the published opinions of authors, who, perhaps, had a favorite theory to support, or an old prejudice to influence them, on a

<sup>1</sup> Wharton’s Evidence, § 665.

<sup>2</sup> Beck’s Med. Jurisprudence, 919.

question or subject constantly advancing. Then the author himself may have changed his opinions since the book was written.”<sup>1</sup>

So in Ordonaux's *Jurisprudence of Medicine* it is said: “The reason of this rule is founded in the principle that the expert is called to express a personal opinion upon a state of facts of variable interpretation, and if a book could pronounce it as well, it would be superfluous to call him. \* \* \* The justice of excluding scientific books from the field of evidence becomes immediately apparent, when we reflect that they deal necessarily only with universal propositions, and inasmuch as every particular case wears a complexion of its own, it is indispensable to its correct interpretation that some living witness, skilled in experience, and able to detect laws of common agreement, should be called in as an expert umpire. As no dictionary of human thoughts will ever be written, so no dictionary of physical laws will ever be compiled, that shall provide with strictest fidelity, the necessary interpretation for all the variously complex and conflicting manifestations of mutational phenomena, not to speak of the more puzzling sphere of antinomies and apparent contradictions.”<sup>2</sup>

§ 176. **Their Admissibility for Purposes of Contradiction.**—We stated in a former section that the rule excluding such treatises from evidence was subject to an exception, and that exception relates to cases when the books are used to contradict an expert. Not that such books can be used to contradict an expert generally, for that would be as improper as it would be to introduce them in evidence

<sup>1</sup> Elwell's *Med. Jurisprudence*, 335.

Ordonaux's *Jurisprudence of Medicine*, 153, 154.

to support his theories.<sup>1</sup> But where an expert in giving his testimony has stated the source of his professed knowledge counsel will be allowed to show by resorting to that source that the expert was mistaken.<sup>2</sup> In other words the authorities which an expert has been allowed to cite in his testimony may be put in evidence for the purpose of contradicting or discrediting him as to opinions expressed by him on their authority. For instance, in a case decided in Michigan in 1882, the court said: "He (the expert) borrowed credit for the accuracy of his statement on referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness, and enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness, and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of."<sup>3</sup>

While this seems to be the better rule it must be said that there is authority against permitting the use of scientific books, even in such cases, for purposes of contradiction.<sup>4</sup> But these cases

<sup>1</sup> *Forest City Ins. Co. v. Morgan*, 22 Ill. Ct. of App. R. 198; *Commonwealth v. Sturtivant*, 117 Mass. 122.

<sup>2</sup> *Huffman v. Click*, 77 N. C. 55; *City of Ripon v. Bittel*, 30 Wis. 614; *Gallagher v. Street Railway Co.*, 67 Cal. 13; *City of Bloomington v. Shrock*, 219, 222.

<sup>3</sup> *Pinney v. Cahill*, 48 Mich. 584.

<sup>4</sup> *State v. O'Brien*, 7 R. I. 336, 338 (1862); *Davis v. State*, 38 Md. 15, 36 (1873)



are opposed to the weight of authority on this subject.

§ 177. **The Right of the Witness to Refer to or Cite Standard Authorities.**—How far a witness may go in referring to medical treatises in giving his testimony it is difficult to say. A witness certainly has the right to refresh his recollection by reference to standard authorities, provided the opinion he gives is his own and not that of another.<sup>1</sup> And inasmuch as an expert witness is not confined, in giving his testimony, to his personal experience, but is allowed to state opinions which he has formed in part from the reading of treatises prepared by persons of recognized ability,<sup>2</sup> it is proper that he should be allowed to state the source from which he derived the opinions so formed.<sup>3</sup> But where a treatise cannot be received in evidence it would seem to be improper to allow an expert to testify what such work contains or says. Hence, in a Wisconsin case, the court held that error had been committed in allowing an expert to testify as to what was said in standard medical works upon the subject of strangulation, and as to the effects which would be produced on the body of the deceased when death resulted from such a cause.<sup>4</sup> And similarly in Massachusetts it was held that no error was committed in declining to allow the witness to read extracts from standard authorities.<sup>5</sup>

<sup>1</sup> *Sussex Peerage Case*, 11 Cl. & F. 114, 117; *People v. Wheeler*, 60 Cal. 581, 585.

<sup>2</sup> See section 19.

<sup>3</sup> In *State v. Baldwin*, 36 Kan. 1, 17, 18 (1886), it is said not to be improper for the expert to state that his opinion was formed from the study of books and men, and that all the writers and authorities on the subject so far as he knew supported him in the opinion which he had expressed.

<sup>4</sup> *Boyle v. State*, 57 Wis. 472, 478 (1883).

<sup>5</sup> *Commonwealth v. Sturtivant*, 117 Mass. 122, 139.

§ 178. **Reading from Authorities and Asking the Witness Whether he Agrees with the Extracts Read.**—An attempt has been made in some cases to evade the rule that medical treatises are inadmissible in evidence. The plan pursued has been to read to the witness extracts from such treatises and then inquire of him whether he agrees with the parts so read. When the books themselves are inadmissible in evidence an attempt to evade the excluding rule by examining or cross-examining in such a way as to get the books before the jury is reprehensible and should not be permitted.<sup>1</sup> In a case in Illinois the trial court allowed counsel on cross-examination to ask the expert if he was acquainted with certain medical authorities, and upon his responding in the affirmative and that they were standard works, counsel was permitted to read at length from each of the authors consecutively and then inquire of the expert if he agreed with the opinions which the authors expressed in the parts read. This was held error and the judgment reversed.<sup>2</sup>

Even in Iowa, whose courts, as we have seen, allow medical treatises to be received in evidence, it has been decided that a question was properly excluded which inquired of an expert whether he had read the opinions of a certain author on a certain subject, and if so, whether those opinions agreed with his own. The court said that the question simply sought to elicit a restatement of the opinion of the witness, and that, therefore, it was properly excluded.<sup>3</sup>

<sup>1</sup> *Marshall v. Brown*, 50 Mich. 148; *People v. Millard*, 53 Mich. 63, 77.

<sup>2</sup> *City of Bloomington v. Shrock*, 110 Ill. 219.

<sup>3</sup> *State v. Winter*, 72 Iowa, 627.

§ 179. **Reading from Scientific Books in Argument.**—The same objections which have been deemed sufficient to exclude scientific treatises as evidence would seem to be equally potent against the right of counsel to read extracts therefrom as a part of their argument to the jury. It is difficult to see how any just distinction can be made between the two cases, and how any such right can be recognized by any court which maintains the inadmissibility of the treatise in evidence. We think the better rule is not to allow counsel to read to the jury as a part of their argument extracts from scientific works, though such works are shown to be standard authorities. Such is the rule in England, as we shall presently see, and such is the rule in this country as recognized by the better authorities. There are, however, a few cases in which the courts have decided that such a right exists, and other cases in which *dicta* may be found which are sometimes referred to as sustaining the same idea. But we must consider all such cases incorrect in principle and not well considered. We shall now examine the cases.

§ 180. **The Rule in England on the Subject.**—In a case in England, where counsel in his address to the jury attempted to quote from a work on surgery, it was held he was not justified in doing so. The report of the case is as follows:

“The prisoner was indicted for the willful murder of his wife, and the defense set up was that of insanity.

“*Clarkson*, for the prisoner, in his address to the jury, attempted to quote from a work entitled ‘Cooper’s Surgery’ the author’s opinions on the subject.



“*Alderson, B.*, thought he was not justified in doing so.

“*Clarkson*—I quote it, my Lord, as embodying the sentiments of one who has studied the subject; and submit that it is admissible in the same way as opinions of scientific men on matters appertaining to foreign law to be given in evidence.

“*Alderson, B.*—I should not allow you to read a work on *foreign law*. Any person who was properly conversant with it might be examined, but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. We should be *inundated* with books were we to hold otherwise.

“*Clarkson*—I shall prove the book to be one of high authority.

“*Alderson, B.*—But can that mend the matter? You surely cannot contend that you may give the book in *evidence*, and if not, what right have you to quote from it in your own address, and do that indirectly which you would not be permitted to do in the ordinary course.

“*Clarkson*—It was certainly done, my Lord, in *Naughten's case*.

“*Alderson, B.*—And that shows still more strongly the necessity for stringent adherence to the rules laid down for our observance. But for the non-interposition of the judge in that case you would not probably have thought it necessary to make this struggle now.”<sup>1</sup> And so in England the law does not permit counsel in their argument to the jury to

<sup>1</sup> The Queen v. Crouch, 1 Cox Cr. Cas. 94.

read as part of their argument extracts from standard medical works.<sup>1</sup>

§ 181. **Cases in the United States Denying to Counsel the Right to Read in Argument from Scientific Books.**—The cases in this country are somewhat at variance on this subject, and we shall first consider the cases which deny the existence of any such right on the part of counsel.

In Massachusetts when counsel for the defendant in his opening to the jury, contending that cribbing was not an unsoundness in a horse, but a habit, proposed to read from a work on veterinary surgery a description of the habit “a better mode of showing what cribbing was, but not as evidence in the case,” it was held no error to refuse to allow him to proceed.<sup>2</sup> So in an earlier case the same court denied the right, on the ground that the extracts would, in effect, be used as evidence.<sup>3</sup>

In Michigan it is well understood that counsel have no such privilege. The question was before the court in 1879, and was so decided.<sup>4</sup>

In North Carolina the question has been carefully considered, and the language of the court in denying the right, warrants repetition in this connection. “It sounds plausible to say, you do not read it as evidence, but that you adopt it as part of your argument. But in so doing the counsel really obtains from it all the benefits of substantive evidence fortified by its ‘standard’ character. He first proves by the medical expert that the work is one of high character and authority in the profession, and then

<sup>1</sup> *Regina v. Taylor*, 13 Cox Cr. Cas. 77.

<sup>2</sup> *Washburn v. Cuddihy*, 8 Gray, 430.

<sup>3</sup> *Ashworth v. Kittridge*, 12 Cush. 194.

<sup>4</sup> *Fraser v. Jennison*, 42 Mich. 206, 214.

he says to the jury, 'here is a book of high standing, written by one who has devoted his talents to the study and explanation of this special subject of nervous diseases. He expresses my views with so much more force than I can, that I will read an extract from his work and adopt it as a part of my argument.' It is evident that the effect of this manœuvre is to corroborate the evidence of the medical expert, or other witnesses, by the authority of a great name testifying, but not under oath, to the same thing as the expert, but with this difference, that the author has not heard the evidence upon which the expert based his opinion.'"<sup>1</sup>

In Wisconsin a judgment was reversed because counsel in his argument had read medical authority to the jury, the court saying: "It is apparent that if counsel are allowed to read extracts of medical authors to the jury, it would nullify the rule which prevents such extracts from being read in evidence."<sup>2</sup>

So in a case in the Circuit Court of the United States for the Northern District of New York, when counsel stated that he desired to read from "Ericson on Railway Injuries," as a part of his argument, Mr. Justice WALLACE declared that he could not read any portion or extract from the book.<sup>3</sup>

The subject was also considered in the Supreme Court of California in 1882. Counsel in the trial court had been permitted, against objection, to read as a portion of his argument from a book called "Browne's Medical Jurisprudence of Insanity." No

<sup>1</sup> *Huffman v. Click*, 77 N. C. 54.

<sup>2</sup> *Boyle v. State*, 57 Wis. 472, 480 (1883).

<sup>3</sup> *Robinson v. N. Y. Central R. R. Co.*, Albany Law J., Oct. 29th, 1881, p. 357. An opinion in this case is found in 9 Federal R., 877, but the point referred to is not considered in the opinion.



testimony had been introduced to show that this was a standard authority, and while stress was laid on this fact by the Supreme Court, the reasoning of that court leads to the conclusion that had such testimony been introduced it could not have affected the judgment announced. Judgment was reversed, and a new trial granted.<sup>1</sup> It seems difficult to understand why any stress should be laid on the fact that the work was not shown to be a standard authority. The right to read from the work at all is predicated upon the fact that counsel has adopted the extract as his own, and made it a part of his argument. The theory is that it comes before the jury, not as the opinion of the writer, for as such it would be inadmissible, but as the opinion or argument of counsel. The right of counsel, therefore, to make the argument cannot depend upon the fact that it is sustained by standard authorities, or by any authorities at all. This fact the court overlooked, although it reached a correct conclusion on the facts.

§ 182. **Cases Sometimes Cited as Supporting the Right of Counsel so to do.**—The most of the cases which are usually referred to as sustaining the right of counsel to read from scientific treatises in their arguments to the jury do not justify on cross-examination, and to the full extent, the claim made for them. The question is sometimes supposed to have been decided in Ohio in 1853, in a case in which counsel had been denied the right to read in argument to the jury, from a medical book, proven by the testimony to be a standard authority. But the Supreme Court did not reverse the judgment because

People v. Wheeler, 60 Cal. 581.

of the denial of the right claimed, the record not showing that the passage which counsel was denied the privilege of reading had any relevancy to the matter in issue, "or came within the appropriate and legitimate scope of argument." To be sure, the opinion contains the following *dictum*: "And it is not to be denied but that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical or other publication, may, by way of argument or illustration, be not only admissible, but sometimes highly proper. And it would seem to make no difference whether it was repeated by counsel from recollection or read from a book." But the court adds: "It would be an abuse of this privilege, however, to make it the pretense of getting improper matter before the jury as evidence in the cause."<sup>1</sup> The right to read a pertinent quotation from a book by way of illustration is one thing, and the right to read the opinions of authors in connection with the facts of a particular case, is another thing. The right to do the first is recognized by the above *dictum*; the right to do the latter does not have the support of even a *dictum* in the opinion above referred to.

The question is also sometimes supposed to have been decided in Texas in 1857, but that case is "on all fours" with the Ohio case already referred to, and what is said of that case is equally applicable to this.<sup>2</sup>

The Supreme Court of Indiana in 1848 said: "If the extracts referred to contained the opinions or expositions of learned or scientific witnesses upon a point in issue, and such extracts were inadmissible

<sup>1</sup> *Legg v. Drake*, 1 Ohio St. 286, 288.

<sup>2</sup> *Wade v. De Witt*, 20 Texas, 398.

when offered as evidence during the introduction of testimony by the parties, the court should not have permitted them to be read at any time. But if the extracts were merely argumentative, and contained no opinions or expositions, which could be regarded as properly matters of evidence, we cannot perceive any valid objection to their being read or adopted as argument, subject, of course, to the instructions of the court as to the law of the case."<sup>1</sup>

And the Supreme Court of Illinois in 1868 held that error was committed when the attorney for the people, against objection, was allowed to read to the jury extracts from medical works which had not been introduced in evidence, and which had not been proved by any witness to be authority, and to state to the jury that what he had read was authority upon the subject of poison by arsenic. The court in the course of its opinion, says: "If the State's attorney in such a case, or in any case, read from medical books in his argument to the jury, the court should instruct them that such books are not evidence, but theories simply, of medical men."<sup>2</sup> This case is sometimes referred to as supporting the theory that counsel have a right to read such books in argument, but no such point was actually decided in the case.

§ 183. **Cases Deciding that Counsel may Read from Scientific Books in Argument.**—The Supreme Court of Connecticut in 1878 decided that a trial court committed an error in declining to allow the attorney for the State in his opening argument to read certain portions of "Ray's Medical Jurisprudence

<sup>1</sup> Jones v. The Trustees, etc. 1 Smith, 47.

<sup>2</sup> Yoe v. The People, 49 Ill. 410, 412.



of Insanity." It appeared that counsel had been permitted by tacit consent, for a long series of years in that State to exercise that right. The court decided, when the question was at length formerly raised, that the practice must be regarded as having, by repetition, hardened into a rule, upon the continued existence of which the counsel had a right to rely. "The question is not, shall such reading, be now for the first time permitted; it is, shall it now for the first time be forbidden without notice."<sup>1</sup> But two of the five judges composing the court dissented, and were of opinion that, notwithstanding the practice to the contrary, the trial court was right in declining to allow counsel to read from such books in argument.

The Supreme Court of Indiana in 1872, and the court in Delaware have upheld the right of counsel to read from standard medical authorities in their argument, the jury being instructed that the extracts read were not to be regarded as evidence.<sup>2</sup> The objections to the practice pointed out in later and better considered cases do not seem to have occurred to the courts announcing these opinions.

§ 184. **Reading the Testimony of Experts as Contained in Official Reports.**—It sometimes happens that expert testimony given in another case is set out at length in the official reports, appearing either in the decision of the court, or in the statement of the case by the reporter. While the opinions of the experts have in such cases been expressed under oath, counsel have no right to make use of them in another case, as no opportunity is afforded in such

<sup>1</sup> *State v. Hoyt*, 46 Conn. 330, 337.

<sup>2</sup> *Harvey v. State*, 40 Ind. 516; *State v. West*, 1 Houston C. C. 371.

cases for any cross-examination. Such a case arose in Illinois, where the State's attorney undertook to read to the jury on a murder trial, the testimony of a professor of chemistry, as found in an official report of another case, concerning the symptoms of poisoning by arsenic. This was pronounced to be the height of injustice, and judgment was reversed <sup>1</sup>

<sup>1</sup> *Yoe v. People*, 49 Ill. 410, 412.

## CHAPTER X.

## COMPENSATION OF EXPERTS.

## SECTION.

185. Statutory Provisions Concerning the Compensation of Experts.
186. Experts need not make a Preliminary Examination unless Special Compensation is made.
187. Experts Cannot be Required to Attend Throughout an Entire Trial for the Purpose of Listening to the Testimony.
188. Whether Experts may Decline to Express an Opinion until Special Compensation is made.
189. Opinions of Writers on Medical Jurisprudence as to Special Compensation.
190. American Cases Favoring the Rights to Extra Compensation.
191. American Cases Denying the Right to Extra Compensation.
192. Extra Compensation Allowed in England.
193. Effect of Making Extra Compensation.
194. Special Compensation to Expert Employed by the State in Criminal Cases.
195. Special Compensation to Experts Summoned for the Defense Paid out of the Public Treasury.
196. Taxing Expense of Services of an Expert as Costs.

§ 185. **Statutory Provisions Concerning the Compensation of Experts.**—In some few States there will be found express statutory provisions on the subject of the compensation to be made to witnesses who have been summoned to testify in the character of experts. The tendency of such legislation has been in the direction of securing to such witnesses the right to extra compensation, if in the discretion of the



court it should seem proper that such extra allowance should be granted. In some cases the language of the statute is that the expert "shall receive" additional compensation to be fixed by the court.<sup>1</sup>

In other cases the statute reads that such witnesses "may be allowed" extra compensation if the court deems it just and reasonable.<sup>2</sup> On the other hand it has been provided in at least one State that such witnesses may be compelled to testify without any extra compensation. It has been so enacted in Indiana.<sup>3</sup>

<sup>1</sup> Thus, the Code of Iowa declares: "Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed, and the degree of learning or skill required; *provided*, that such additional compensation so fixed shall not exceed four dollars per day while so employed." McClain's Ann. Code of Iowa (Rev. Sts. 1888), p. 1493, § 5090. And in North Carolina the statute reads as follows: "Experts when compelled to attend and testify, shall be allowed such compensation and mileage as the court may, in its discretion, order." Laws of 1871, ch. 139, § 13.

<sup>2</sup> The provision in Minnesota is as follows: "That the judge of any court of record in this State, before whom any witness is summoned, or sworn and examined, as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as, in his judgment, may be just and reasonable." Gen. St. 1878, ch. 70, § 8. In Rhode Island the provision reads as follows: "In addition to the fees above provided, witnesses summoned and testifying as experts in behalf of the State before any justice of the Supreme Court, trial justice or coroner, may be allowed and paid such sum as such justice of the Supreme Court, trial justice or coroner may deem just and reasonable: *Provided*, that the allowance so made by any trial justice or coroner shall be subject to the approval of a justice of the Supreme Court." Pub. St. (1882), p. 733, § 15.

<sup>3</sup> The provision is as follows: "A witness who is an expert in any art, science, trade, profession, or mystery, may be compelled to appear and testify to an opinion, as such expert, in relation to any matter, whenever such opinion is material evidence, relevant to any issue on trial before a court or jury, without payment or tender of compensation other than the *per diem* and mileage allowed by law to witnesses, under the same rules and regulations by which he can be compelled to appear and testify to his knowledge of facts relevant to the same issue." Indiana Rev. St. (1881), p. 94, § 504.

In a case in Minnesota where the statute read that the court in its discretion might allow such compensation to expert witnesses as it thought just and reasonable,<sup>1</sup> the court construed the statute as being evidently designed to leave the matter of allowing or disallowing extra compensation to expert witnesses wholly to the discretion of the trial judge, and it declared that if there could be a case in which it (the Supreme Court) would feel warranted in reversing an order refusing such allowance it would at most only be one where there had been a most palpable and gross abuse of discretion.<sup>2</sup> But on the other hand in North Carolina where the statute read that experts should be allowed such compensation as the court in its discretion might order,<sup>3</sup> the court seemed to think that this conferred a right to extra compensation, and it overruled the action of the trial court which had declined to grant the extra compensation.<sup>4</sup>

It is to be observed, however, that these statutes do not apply to the case of witnesses engaged in the professions, and summoned to testify as to ordinary facts, rather than to opinions founded on special study and experience.<sup>5</sup> Thus, in a case in the Supreme Court of Minnesota, it is laid down that the statute was designed to apply only to cases "where witnesses are called to testify to an opinion founded on special study or experience in any profession or calling, or to make scientific or professional examinations of some matter connected with the is-

<sup>1</sup> The provision is set forth in full in note 2, p. 421.

<sup>2</sup> *Le Mere v. McHale*, 30 Minn. 410.

<sup>3</sup> The provision is set out in note 1, p. 421.

<sup>4</sup> *State v. Dollar*, 66 N. C. 626.

<sup>5</sup> *Snyder v. Iowa City*, 40 Iowa, 646.

sues involved in the case, and then state the results, and not to cases where a witness, skilled in some profession or calling, is called upon to testify as to facts within his personal knowledge, although he may have acquired his knowledge of the facts while in the ordinary practice of his profession, and although his professional skill may have enabled him to observe such facts more intelligently and narrate them more correctly. In respect to facts within his knowledge, there is no reason why a professional man should not stand upon an equality with any other witness, when called upon to testify to what he has seen or personally knows about the facts of a particular case. He is only performing a duty which every other citizen is required to do, and is not, in our opinion, 'summoned or sworn and examined as an expert,' within the meaning of the statute."<sup>1</sup>

§ 186. **Experts Need not Make a Preliminary Examination, unless Special Compensation is Made.**—An expert cannot be compelled to make any preliminary investigation of the facts involved in a case, in order to enable him to attend on the trial and give a professional opinion. For instance, if the State desires the opinion of medical experts as to the cause of death, it cannot compel them to make a *post-mortem* examination of the body of the deceased, for the purpose of qualifying them to express an opinion as to what was the cause of death.<sup>2</sup> And in the same way an expert can not be required to make a personal examination of one alleged to be insane, in order that he may become

<sup>1</sup> *Le Mere v. McHale*, 30 Minn. 410.

<sup>2</sup> See *Summers v. State*, 5 Tex. Ct. of App., 374, 378.



qualified to express his opinion as to the mental condition of the one whose sanity is called in question.

§ 187. **Experts Cannot be Required to attend Throughout an Entire Trial for the Purpose of Listening to the Testimony.**—Experts cannot be compelled to attend a trial from its inception to its close and listen to all the testimony given, in order that they may become thereby qualified to express an opinion upon the evidence.

Thus, in a case in New York, the court says: "The district-attorney, it is true, might have required the attendance of Dr. Hammond on subpoena; but that would not have sufficed to qualify him to testify as an expert, with clearness and certainty, upon the question involved. He would have met the requirement of a subpoena if he had appeared in court when he was required to testify, and given proper impromptu answers to such questions as might then have been put to him in behalf of the people. He could not have been required under process of subpoena to examine the case and to have used his skill and knowledge to enable him to give an opinion upon any points of the case, nor to have attended during the whole trial and attentively considered and carefully heard all the testimony given on both sides, in order to qualify him to give a deliberate opinion upon such testimony as an expert in respect to the question of the sanity of the prisoner."<sup>1</sup>

§ 188. **Whether Experts May Decline to Express an Opinion Until Special Compensation is Made.**—There can be no doubt that professional men are

<sup>1</sup> People v. Montgomery, 13 Abbott's Pr. R. (N. Y.), 207, 240.

not entitled, in this country, to claim any additional compensation when testifying as ordinary witnesses to facts which happen to fall under their observation.<sup>1</sup> But another question arises, when they are summoned to testify as to facts of science with which they have become familiar by means of special study and investigation, or to express opinions based upon the skill acquired from such researches, as to conclusions which ought to be drawn from certain given facts. Whether they can be compelled to testify in such cases, when no other compensation has been tendered than the usual fees of witnesses testifying to ordinary facts, is a point upon which the cases are not in harmony. In this country the cases are nearly balanced, and the question must be regarded as still an open one, although the weight of authority rather inclines to the theory that the expert may be required to answer without additional compensation.

The time of professional men is said to be more valuable than that of non-professional men. But it is very doubtful whether this is true at the present time if it ever was true. The time of a man engaged in important business enterprises is very valuable. There is no way of ascertaining whether the time of such a man is more or less valuable than that of a professional man, and if there were it would not be important that it should be determined. Witnesses are not compensated according to the value of their time, and to undertake to establish any such basis of compensation is entirely impracticable. One professional man's time may be of great value, and

<sup>1</sup> Snyder v. Iowa City, 40 Iowa, 646. And see Buchman v. State, 59 Ind. 1.

another's of little value ; and the same man's time may be very valuable on one day and not especially so on another. The same may likewise be affirmed of a business or non-professional man's time. It is said also that a professional man's knowledge and skill constitute a species of property, which he cannot be deprived of without compensation. But in the administration of justice, a professional man's services, at least in the legal profession, can be exacted of him without compensation. The weight of authority in this country establishes the doctrine that an attorney can be assigned by the court to defend, without compensation, a poor person accused of crime, and if he declines to comply with the order he may be punished for contempt. If he obeys the order he is not, in the absence of a statute authorizing it, entitled to any compensation from the State for the knowledge and skill thus exacted from him.<sup>1</sup>

The cases are not in all respects analogous, but they are sufficiently so to give rise to an inference, not wholly unjustifiable, that if the State has a right to avail itself, without compensation, of the professional skill of a lawyer, to defend a person accused of crime, it also has a right to the opinion of a medical expert, without extra compensation, as to the sanity or insanity of the person accused. The professional knowledge and skill of a lawyer is as much the property of the lawyer as is the like knowledge and skill of the physician. The lawyer, to be sure, is an officer of the court, and as such is subject to the lawful commands of the court. But

<sup>1</sup> *Bacon v. County of Wayne*, 1 Mich. 461; *Rowe v. Yuba Co.*, 17 Cal. 61.



has the court any greater right to the private property of one of its officers than it has to the property of one who does not stand in official relations to it?

Whatever the answer may be, it may be confidently asserted that if an expert claims that an exception exists exempting him from the general rule, which requires all witnesses on the payment of the fees allowed by statute to testify as to matters within their knowledge, that the burden is on him to establish the exception.

He does not establish the exception by proving that his knowledge is a thing of value. A man's time is also a thing of value, and yet, at least in criminal cases, the law may require a witness to attend and testify without the payment of any fees for attendance or for mileage. Such laws do not contravene any constitutional provision.<sup>1</sup>

As is said in one case: "It is as much the duty and interest of every citizen to aid in prosecuting a crime, as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial."<sup>2</sup>

We are inclined to think, at least in criminal cases, that an expert, in the absence of a statute governing the case, should be required, without extra compensation, to testify to matters involving professional knowledge and skill. His protection against unreasonable demands for such professional

<sup>1</sup> *Daily v. Multnomah County*, 14 Oreg. 20.

<sup>2</sup> *Israel v. State*, 8 Ind. 467.

service lies in the fact that he cannot be required to make any personal examination, or preliminary preparation, or to attend throughout the trial for the purpose of listening to the testimony. His opinion can be had on a hypothetical case, but as a general rule something more than that is desired, and that something cannot be had without suitable compensation.

The question involved is one of much importance, and the authorities will be considered somewhat at length.

§ 189. **Opinions of Writers on Medical Jurisprudence as to Additional Compensation.**—Before examining the decisions of the courts on the question, attention is called to the opinions of the writers on medical jurisprudence. For while these opinions cannot be regarded as authoritative, they are important, and entitled to the respectful consideration of the profession and the courts. In “Ordonaux’s Jurisprudence of Medicine,”<sup>1</sup> that learned and distinguished writer says: “It is evident that the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to bestow it gratuitously upon any party. Neither the public, any more than a private person, have a right to extort services from him, in the line of his profession, without adequate compensation. On the witness stand, precisely as in his office, his opinion may be given or withheld at pleasure; for a skilled witness cannot be compelled to give an opinion, nor committed for contempt if he refuse to do so. Whoever calls for an opinion from him in chief is under obligation to remunerate him, since he has to that

<sup>1</sup> §§ 114, 115.

extent employed him professionally; and the expert, at the outset, may decline giving his opinion until the party calling him either pays or agrees to pay him for it. When, however, he has given his opinion, he has now placed it among the *res gestæ*, and cannot decline repeating it or explaining it on cross-examination. Once uttered to the public ear of the court, it passes among the facts in evidence.”

So in Beck’s Medical Jurisprudence the eminent author, in considering the subject, comments as follows:

“ If the duties on which I have enlarged are important to the community, in promoting the proper administration of justice, ought not the individuals engaged in them to receive adequate compensation? I advert to this, not only because it is just in principle, but because it would remove all imputation of volunteering in criminal cases. No one can refuse being a witness when legally summoned; every one, I presume, may decline the dissection of a dead body, or the chemical examination of a suspected fluid; and yet there is not, I believe, an individual attending on any of our courts who is not paid for his time and services, with the exception of such as are engaged in these investigations. \* \* \* It is quite time that the medical profession in this country should rouse itself to a demand of its just rights.”<sup>1</sup>

§ 190. **American Cases Favoring the Right to Extra Compensation.**—The earliest of the American cases upon this subject seems to have arisen in the District Court of the United States for the District of Massachusetts, in 1854. The question came up

<sup>1</sup> Beck’s Medical Jurisprudence, 920, 921.



before SPRAGUE, J., in the following manner : During a trial upon an indictment, a motion for a *capias* was made by the district attorney, for the purpose of bringing in a witness subpoenaed to act as an interpreter of some German witnesses, but who had refused or neglected to attend. In answer to this application, the court said : "A similar question has heretofore arisen, and I have declined to issue process to assist in such cases. When a person has knowledge of any fact pertinent to the issue to be tried, he may be compelled to attend as a witness. In this all stand upon an equal ground. But to compel a person to attend, merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved. Thus, the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise. This is so unreasonable that nothing but necessity can justify it. The case of an interpreter is analogous to that of an expert. It is not necessary to say what the court would do if it appeared that no other interpreter could be obtained by reasonable effort. Such a case is not made as the foundation of this motion. It is well known that there are in Boston many native Germans, and others skilled in both the German and English languages, some of whom, it may be presumed, might, without difficulty, be induced to attend for an adequate compensation."<sup>1</sup>

<sup>1</sup> In the Matter of Roelker, 1 Sprague, 276.

The question came before the Supreme Court of Indiana in 1877, in *Buchman v. The State*,<sup>1</sup> the statutory provision above noted not having been enacted at that time, and that court held that while a physician or surgeon could be required to attend as a witness to facts without other compensation than that provided by law for other witnesses, yet he could not be required to testify as to his professional opinion, without the compensation of a professional fee. In the opinion of the court the professional knowledge of an attorney or physician is to be regarded in the light of property, and his professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. "When a physician testifies as an expert, by giving his opinion, he is performing," says the court, "a strictly professional service. To be sure, he performs that service under the sanction of an oath. So does the lawyer, when he performs any services in a cause. The position of a medical witness, testifying as an expert, is much more like that of a lawyer than that of an ordinary witness, testifying to facts. The purpose of his service is not to prove facts in the cause, but to aid the court or jury in arriving at a proper conclusion from facts otherwise proved." The court then goes on to say that if physicians or surgeons can be compelled to render professional services by giving their opinions on the trial of causes, without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State, at any and all times, to render such service without other compensation than

<sup>1</sup> 59 Ind. 1.

is afforded by the ordinary witness fees. And this the court does not think he can be compelled to do. This conclusion is based both upon general principles of law and the Constitution of the State, which provides "that no man's particular services shall be demanded without just compensation."

The question came up again in the case of the *United States v. Howe*, decided in the United States District Court for the Western District of Arkansas.<sup>1</sup> In this case, which was a prosecution for murder, a physician summoned as an expert, being sworn refused to testify, unless first paid a reasonable compensation for giving the results of his skill and experience. The court declined to regard this refusal as a contempt of court. The distinction was sustained between a witness called to depose to a matter of opinion depending on his skill in a particular profession or trade, and a witness called to depose to facts which he saw. When he has facts within his knowledge, the public have a right to those facts, but the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to bestow them gratuitously upon any party. That the public cannot, any more than a private person, extort services from a person in the line of his profession or trade without adequate compensation.

The decision of the Indiana court in the case above referred to is in harmony with the decisions of the same court holding that an attorney cannot be compelled without compensation to defend a person accused of crime. But the doctrine of that court

<sup>1</sup> 12 Cent. L. J. 193. The case does not appear in the Federal Reporter.



denying the power to compel an attorney to render such services without compensation is contrary to the doctrine which generally prevails in this country, and its decision as to the right of an expert to extra compensation, being predicated on its own peculiar doctrine applied to attorneys, is correspondingly weakened as an authority.

§ 191. **American Cases Denying the Right to Extra Compensation.**—A different conclusion to that reached in the foregoing cases was arrived at in the Supreme Court of Alabama in 1875, in *Ex parte Dement*.<sup>1</sup> The prisoner on trial was charged with murder, and the physician, after testifying that he had seen the deceased after he had received the wounds which the prosecution asserted had produced death, was asked to state the nature and character of the wound received, and its probable effect. This he declined to do upon the ground that "he had not been remunerated for his professional opinion, nor had compensation for his professional opinion been promised or secured." A fine was thereupon imposed upon him for contempt of court. A motion to have the fine set aside upon the ground that the court could not compel him to testify as a professional expert until compensation for his professional opinion had been first made or secured, having been overruled, the case was taken on appeal to the Supreme Court, which affirmed the ruling. In their decision, after an examination of the authorities, the court say: "It will be noticed that it has not been adjudged in any of the cases cited, that a physician or other person examined as an expert is entitled to be paid for his testimony as for *professional opinions*. The re-

<sup>1</sup> 53 Ala. 389.

ports contain nothing to this effect. The English cases only indicate, and it is implied by the decision of Judge SPRAGUE (*In the matter of Roelker*),<sup>1</sup> that persons summoned to testify as experts ought to receive compensation for their *loss of time*. And it is to be inferred that the judges delivering some of the opinions thought the time of such a witness ought to be valued, in the language of the English statute, 'according to his countenance and calling.' But it is not intimated by any of them, that a physician, when testifying, is to be considered as exercising his skill and learning in the healing art, which is his high vocation; or that a counselor at law, in the same situation, is exerting his talents and requirements in professionally investigating and upholding the rights of a client. If this were so, each one should be paid for his testimony as a witness, as he is paid by clients, or patients, according to the importance of the case and his own established reputation for ability and skill. But in truth he is not really employed or retained by any person. And the evidence he is required to give should not be given with the intent to take the part of either contestant in the suit, but with a strict regard to the truth, in order to aid the court to pronounce a correct judgment." It is to be observed that this case was decided two years prior to the case of *Buchman v. The State*, in which the right to extra compensation was grounded, not upon the *loss of time*, upon which the Alabama court comments disapprovingly, but upon the ground that professional knowledge constitutes *property* of which he cannot be deprived without just compensation.

<sup>1</sup> Sprague's Decisions, 276.

In 1879, the question came up before the Court of Appeals of Texas in *Summer v. State*.<sup>1</sup> In this case, the defendant, being on trial for murder, the State called a medical practitioner, one Dr. Spohn, who testified that he had attended the deceased, and had made a *post-mortem* examination, but declined to state the cause of his death. In his testimony he said: "I found the deceased breathing, but unconscious; had a contusion upon the left side of the head, but no exterior evidence of fractured skull; removed the patient to town, and attended until the next day, when he died; after death, made a *post-mortem* examination, but I decline to state the cause of the man's death, as my knowledge was obtained by professional skill and from the deductions of experience, which I consider my own property, and which the county of Neuces has persistently refused to pay for. I have no knowledge of the actual cause of the man's death, save through the *post-mortem* examination alluded to." The trial court sustained this refusal to disclose the knowledge thus acquired, upon the ground that not having been paid, he could not be compelled to testify as to the same. But the Court of Appeals viewed the matter in a different light, and expressed itself as follows: "The court can compel a physician to testify as to the result of a *post-mortem* examination; and it is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty should refuse to testify in a cause pending before the courts of his country, involving the life and liberty of a fellow being, and the rightful administration of the

<sup>1</sup> 5 Court of Appeals, 374.



laws of a common country. Dr. Spohn has doubtless been misled, in taking the position he did, by the misconception of certain writers on medical jurisprudence."

The court then refers to *Ex parte Dement*, and concludes as follows: "A medical expert could not be compelled to make a *post-mortem* examination unless paid for it; but an examination having already been made by him, he could be compelled to disclose the result of that examination."

In 1887, the question was raised in the Supreme Court of Minnesota, in a trial of one accused of rape. A physician was asked: "Wouldn't it be impossible for this prosecutrix, after having been raped the night previous, to sleep soundly and do her work the next day?" He declined to answer, and the Supreme Court in passing on it said: "In this State no witness can refuse to answer a question on the ground that his answer will be what is known as expert evidence; and this, whether he has been summoned or paid as an expert or not."

In 1884, a case came before the Supreme Court of Illinois. In that case a physician, without making any objections to doing so, testified that he had found no bruises or signs of violence upon a person, and that he found him complaining of "dizziness, and buzzing in his head and ears, and was laboring under the hallucination that certain parties were in pursuit of him, and were seeking to harm him." He was then shown an instrument known as a policeman's "billy," and was asked whether a blow struck with it would or would not be likely to produce upon the person struck a condition similar to

<sup>1</sup> State v. Teipner, 36 Minn. 532, 537.

that in which he found the person in question. The witness stated that he regarded the question as calling for a professional opinion, and declined to answer unless first paid a fee of \$10. The Supreme Court held that he was bound to answer. They say: "Having without objection stated the condition of the patient he had visited professionally, the witness could not, under any rule of law, refuse to state what would cause the symptoms he discovered to exist. That was pertinent to the subject about which he had testified voluntarily." The court thought it unnecessary to consider the general question of whether an expert could be compelled, without extra compensation, to give expert testimony concerning a matter on which he had not previously testified.<sup>1</sup>

In a recent case in one of the inferior courts of Pennsylvania, it was decided that a physician, sworn as a witness at a coroner's inquest, could not decline to state his opinion as to the effect of certain medicines administered to the deceased, but that he was bound to answer without the payment of a professional fee.<sup>2</sup>

§ 192. **Extra Compensation Allowed in England.**—In *Betts v. Clifford*,<sup>3</sup> Lord CAMPBELL declared that a scientific witness, or expert, was not bound to attend upon being served with a *subpœna*, and that he ought not to be subpœnaed. If the witness, however, knew any question of *fact*, he might be compelled to attend, but he could not be compelled to attend, to speak merely to matters of opin-

<sup>1</sup> Wright v. People, 112 Ill. 540.

<sup>2</sup> Commonwealth v. Higgins, 5 Kulp (Pa.), 269.

<sup>3</sup> Warwick Lent Assizes, 1858.

ion. The same distinction was also taken in *Webb v. Page*,<sup>1</sup> which was a case in which a witness had been called by the plaintiff to testify as to the damage sustained by certain cabinet work, and the expense necessary to restore or replace the injured articles. The witness having demanded compensation, Mr. Justice MAULE said: "There is a distinction between the case of a man who sees a fact, and is called to prove it in a court of law, and a man who is selected by a party to give his opinion on a matter on which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his own knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation; there is no such necessity for his evidence, and the party who selects him must pay him." According to these cases, therefore, an expert is under no obligation to testify as to matters of opinion, at least in civil cases. If his testimony is desired, the party desiring it must first render him such compensation as his services are worth. It is also to be noticed that, in England, it has been held, in civil cases at least, that a professional man, even though called to testify to facts, and not to opinions, is entitled to extra compensation on the higher scale allowed under the statute of Elizabeth,<sup>2</sup> which provides that the witness must "have tendered to him, according to his countenance or calling, his reasonable charges." In a case decided in 1862, the expenses of an attorney, called as a witness, but who did not

<sup>1</sup> 1 Car. & K. 25.

<sup>2</sup> 5 Eliz. ch. 9.



give professional evidence, were allowed by the Master, on the higher scale allowed professional witnesses. This allowance was held proper on motion to show cause, and Mr. Chief Justice EARL said: "We do not approve of the rule which is said to prevail in criminal cases, that if a surgeon is called to give evidence not of a professional character he is only to have the expenses of an ordinary witness. We think the Master was quite right in allowing the expenses of this witness on the higher scale."<sup>1</sup> So also in *Turner v. Turner*,<sup>2</sup> the same principle was applied by the vice-chancellor in the case of a barrister. The theory seems to be that the time of professional men is more valuable than the time of non-professional men, and that they should be compensated accordingly. It has been suggested that the rule is a hard one,<sup>3</sup> and it may be considered doubtful whether it can stand the test of examination.

§ 193. **The Effect of Making Extra Compensation.**

—It is undoubtedly the practice in all important cases, for the parties calling experts, or professional witnesses, to pay them an additional compensation. And it is not considered contrary to the policy of the law that these witnesses should be specially feed. For if special compensation was not made or permitted, the testimony of such witnesses could not be secured without great pecuniary loss and perhaps could not be secured at all. While the question as to the amount paid, or agreed to be paid in such cases, cannot affect in the least the regularity of the trial,

<sup>1</sup> *Parkinson v. Atkinson*, 31 L. J. (N. S.) C. P. 199.

<sup>2</sup> 5 J.L.R. (N. S.) 839.

<sup>3</sup> See *Lonergan v. Royal Exchange Assurance*, 7 Bing. 725, 727; *Collins v. Godefroy*, 1 Barn. & Adol. 930.

yet it is stated that it may, perhaps, properly affect the credit of the witness with the jury.<sup>1</sup>

§ 194. **Special Compensation to Experts Employed by the State in Criminal Cases.**—Even in the absence of express statutory provision authorizing it, it has been the practice in many of the States, in criminal cases, to make a proper compensation to the experts summoned by the government. As lawyers who are employed by the government to assist in the prosecution of the criminal, receive a special compensation, so the experts receive a special compensation; and this is allowed under certain statutory provisions authorizing the allowance of accounts for necessary services and expenses.

§ 195. **Special Compensation to Experts Summoned for the Defense Paid out of the Public Treasury.**—The Supreme Court of Massachusetts, in 1870, had its attention called to the right to allow the prisoner's counsel, in the case of an indictment for murder, to tax as a part of the cost to be paid out of the public treasury, extra compensation to the experts employed by him, as a part of the necessary expense of the trial, and as such to be allowed under the statutes referred to in the preceding section. As the question is an important one we quote from the decision, allowing such taxation, as follows :

“ Whenever the prosecuting officer thinks the interests of justice require it, we do not doubt that he is authorized, by the statutes above mentioned, to employ experts to make proper investigations for ascertaining the truth, of a case, and that it is proper for him in some capital cases to enable the

<sup>1</sup> See *People v Montgomery*, 13 Abb. Pr. (N. S.) 220.

prisoner's counsel to make similar investigations, and to procure the attendance of experts at the trial, if the prisoner is not able to do so ; and the court is authorized to allow a reasonable compensation to such experts for their services, both for attending the trial, and for their prior investigations. This is not on the ground that the statute has given to a prisoner the right to such aid at the expense of the public treasury ; but on the ground that it is for the interest of the commonwealth, in the case then before the court, that all proper investigations should be made, in order to guard against the danger of doing injustice to the prisoner in a case where he is exposed to so great a penalty. \* \* \*

We do not think the prosecuting officer or the court would be authorized to allow the charges of all such persons as the prisoner would have a right to employ as experts at his own expense, without regard to their character or to the need of employing them in the case. But the assent of the prosecuting officer should be obtained beforehand to the employment of such experts as may be selected and agreed upon, or, in the case of his refusal to assent, application should be made to the court to appoint the experts. This would be the more proper course of proceeding, if the prisoner desires to have the experts called by him paid out of the public treasury.'''<sup>1</sup>

§ 196. **Taxing Expense of Services of an Expert as Costs.**—If either party sees proper to employ the services of an expert for his own benefit, the court will not, in the absence of a statutory provision authorizing it, require the opposite party to pay for

<sup>1</sup> Attorney-General Petitioner, 104 Mass. 537.



the services thus rendered by charging the same as a part of the costs of the action.<sup>1</sup> In an action for the dissolution of a partnership and for an accounting, one of the parties employed an expert to examine the books of the partnership, and afterwards sought to have the expense of such services taxed as costs against the losing party. In declining to allow them to be so taxed the court said: "If the services of an expert are necessary for the proper presentation and determination of the case, he should be appointed by and under the direction of the court. When, as in this case, he is the employee of one of the parties, the temptation to act in the interest of such party must be apparent. Therefore, in order to secure his fair and disinterested services, he should be appointed by the court, and not by either of the parties."<sup>2</sup>

<sup>1</sup> *Faulkner v. Hendy*, 79 Cal. 265 (1889); *Mark v. City of Buffalo*, 87 N. Y. 184, 189. And see *Haynes v. Mosher*, 15 How. Pr. 216.

<sup>2</sup> *Faulkner v. Hendy*, 79 Cal. 265.

## CHAPTER XI.

## THE WEIGHT OF EXPERT TESTIMONY.

## SECTION.

197. The Right of a Court to Express an Opinion on the Facts.
198. The Right of a Court to Give Cautionary Instructions in Certain Cases.
199. Why Expert Testimony Should in Some Cases be Received with Caution.
200. Cases Holding that Expert Testimony Should be Received with Caution.
201. Cases Holding that Expert Testimony Should be Considered as other Testimony, and Tried by the Same Tests.
202. Cases Holding that Expert Testimony is Entitled to Little Weight.
203. Cases Holding that Expert Testimony in Matters of Medical Science is Entitled to Great Weight.
204. Cases Denying that the Testimony of Physicians as to Mental Condition is Entitled to Greater Weight than that of Ordinary Witnesses.
205. The Testimony of a Family Physician as to Mental Condition—Weight Accorded to.
206. The Different Theories Discussed.
207. The Right and Duty of the Jury as to Expert Testimony.

§ 197. **The Right of a Court to Express an Opinion on the Facts.**—We have pointed out heretofore that it is the province of the court to decide whether a witness is competent to give testimony, and whether the testimony it is proposed he shall give is admissible in evidence in the particular case. And we have seen that the court may properly instruct the

jury to disregard the testimony of experts when that testimony is based on an hypothesis which the jury find to be not in accordance with the facts.<sup>1</sup> It is now our purpose to consider the functions of the jury in passing on expert testimony in general. It is important to keep in mind that in the administration of justice there is a division of functions between court and jury, which it is essential that both court and jury should respect. For while it is the function of the court to rule on the competency of witnesses and the admissibility of evidence, it is a fundamental and well established principle of law that the weight which is to be accorded to the evidence when admitted is a question that lies within the province of the jury to determine.

After the evidence has been heard, and the arguments of counsel have been made, the trial judge instructs the jury as to the rules of law by which that body is to be governed in arriving at its verdict.

In delivering this "charge" it is understood that the judge is at liberty to recall to the minds of the jury the testimony which has been given, and that it is his duty to state the law by which the matter in issue is to be decided. The judge has no right, however, to take away from the jury the decision of any question of fact, neither can he deprive it of the right to determine what credit shall be given to the testimony. That the weight to be accorded to testimony is a question for the jury is a well established rule as to evidence in general.<sup>2</sup> And the

<sup>1</sup> See section 32.

<sup>2</sup> *Bowman v. Smith*, 1 Strobb. (S. C.) 246; *Keister v. Miller*, 25 Pa. St. 481; *State v. Hogard*, 12 Minn. 293; *State v. Upton*, 20 Mo. 397; *Kelly v. Emery*, 75 Mich. 147, 152; *Conely v. McDonald*, 40 Mich. 150, 158; *People v. Barry*, 31 Cal. 357.



same principle in this respect is applied to the testimony of experts, that is applied to the testimony of ordinary witnesses.<sup>1</sup>

But while the court informs the jury that it is its privilege to say what witnesses are worthy of belief, the judge sometimes casts discredit on the testimony of a witness by expressing his own opinion concerning the evidence. Whether the court has the right thus to express its own opinion has been a subject of conflicting decisions. The English courts have recognized the principle that a judge's expression of opinion on matters of fact is not reversible error, if the jury is informed and made to understand that it is not bound to follow the opinion expressed, but has the right and duty to decide for itself.<sup>2</sup> And so in the Federal Courts of the United States it is settled that a case will not be reversed because the court has expressed itself on the facts, provided no rule of law has been incorrectly stated, and all matters of fact have been ultimately submitted to the jury.<sup>3</sup> Some of the State courts have asserted a similar doctrine.<sup>4</sup> But in some of the States the

<sup>1</sup> *Mitchell v. State*, 58 Ala. 418; *Delaware, etc. Steam-boat Co. v. Starrs*, 69 Pa. St. 36, 41; *Sikes v. Paine*, 10 Ired. (N. C.) Law, 282; *Davis v. State*, 35 Ind. 496; *Forgery v. First National Bank*, 66 Ind. 123; *Howard v. Providence*, 6 R. I. 516; *Pannell v. Commonwealth*, 86 Pa. St. 260, 269; *Snyder v. State*, 70 Ind. 349; *Johns v. Thompson*, 72 Ind. 167; *Flynt v. Bodenhamer*, 80 N. C. 205; *State v. Secrest*, 80 N. C. 450; *Keithsburg, etc. R. R. Co. v. Henry*, 79 Ill. 290; *Pratt v. Rawson*, 40 Vt. 183, 188; *Tatum v. Mohr*, 21 Ark. 354; *Humphries v. Johnson*, 20 Ind. 190.

<sup>2</sup> *Taylor v. Ashton*, 11 M. & W. 400; *Davidson v. Stanley*, 2 M. & G. 721; *Darby v. Ouseley*, 1 H. & N. 1; *Solarte v. Melville*, 7 B. & C. 430.

<sup>3</sup> *Lovejoy v. United States*, 128 U. S. 171; *Rucker v. Wheeler*, 127 U. S. 85, 93; *United States v. Reading R. R. Co.*, 123 U. S. 113, 114; *St. Louis, etc. R. R. Co. v. Vickers*, 122 U. S. 360; *Vicksburg, etc. R. R. Co. v. Putnam*, 118 U. S. 545, 553; *Tracy v. Swartout*, 10 Pet. 80; *Games v. Stiles*, 14 Pet. 322.

<sup>4</sup> *Sheahan v. Barry*, 27 Mich. 217, 226; *People v. Rathbun*, 21 Wend. (N. Y.) 509; *Commonwealth v. Child*, 10 Pick. (Mass.) 252; *Swift v.*

courts are expressly prohibited, either by constitutional or statutory provision, from charging juries in respect to matters of fact.<sup>1</sup> When such constitutional or statutory provisions exist it is unquestionably reversible error for a judge to express any opinion as to the credibility of witnesses, or as to the weight of the testimony.<sup>2</sup> And in some cases, where no such constitutional or statutory restraints exist, there have been expressions to the effect that the practice of expressing an opinion on the facts is a dangerous one, and not to be generally indulged in, and not a few cases have been reversed where it has been done.<sup>3</sup>

§ 198. **The Right of a Court to Give Cautionary Instructions in Certain Cases.**—The expression of an opinion by the court as to whether a witness is worthy of belief, or as to whether certain testimony is worthy of credit, is one thing, and the giving by the court of cautionary instructions concerning the credibility of certain classes of witnesses, or the probative value of certain kinds of testimony, is another matter, and one that we shall now consider. The question is whether a court can properly give cau-

Stevens, 8 Conn. 431; *Gale v. Spooner*, 11 Vt. 152; *Bruch v. Carter*, 32 N. J. Law, 554, 555; *Ware v. Ware*, 8 Me. 42, 59; *Flanders v. Colby*, 28 N. H. 34, 39; *Patterson v. Colebrook*, 29 N. H. 94; *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245; *Bonner v. Herrick*, 99 Pa. St. 220.

<sup>1</sup> See Ala. Code, 1886, § 2754; California Const. of 1879, art. 6, § 19; Georgia Rev. St. 1873, § 3284; Mass. Pub. Sts. 1882, ch. 153, § 5; Nevada Const. 1864, art. 6, § 12; S. Car. Const. 1868, art. 4, § 26; Tenn. Const. 1870, art. 6, § 9.

<sup>2</sup> *Crutchfield v. Richmond, etc. R. R. Co.*, 76 N. C. 320; *State v. Smallwood*, 75 N. C. 104; *Ledbetter v. State*, 21 Tex. App. 344; *Kimbro v. Hamilton*, 28 Tex. 560; *Morris v. Lachman*, 68 Cal. 109, 113.

<sup>3</sup> See *People v. Gastro*, 75 Mich. 127, 128; *People v. Lyons*, 49 Mich. 78, 82; *Beurmann v. Van Buren*, 44 Mich. 496; *Hall v. People*, 39 Mich. 717; *Richards v. Fuller*, 38 Mich. 653, 657; *Welch v. Ware*, 32 Mich. 77; *Perrott v. Shearer*, 17 Mich. 48; *Knowles v. People*, 15 Mich. 408, 412.

tionary instructions concerning the value and weight of expert testimony.

That in certain classes of cases courts are allowed to give cautionary instructions is clear enough. For example, take the case of detectives, who have entered into the apparent prosecution of the purposes of a conspiracy in order that they may thereafter disclose it, and bring the parties concerned therein to justice, courts have been allowed to say to juries that the testimony of this class of individuals is to be received with great caution.<sup>1</sup>

Again, courts have been allowed to inform juries that great caution is to be used in considering the testimony of an accomplice.<sup>2</sup> So they have been permitted to instruct juries that they may view with strong suspicion the testimony of witnesses who, with intention to deceive, have sworn wilfully and knowingly to that which was false.<sup>3</sup> And in some cases courts have been sustained in telling juries that the law regards with suspicion the testimony of persons nearly related to the accused, and that the jury may properly take into consideration the relation of the witnesses in estimating the credit to be given to their testimony.<sup>4</sup> Likewise when witnesses have exhibited feeling and partiality in giving their testimony, a trial court has been sustained in

<sup>1</sup> *Prewit v. People*, 5 Neb. 384; *Heldt v. State*, 20 Neb. 492; *State v. McKean*, 4 Gray, 29, 31; *Commonwealth v. Graves*, 97 Mass. 115; *Rex v. Despard*, 28 Howell, St. Tr. 346, 498. And see *Moller v. Moller*, 115 N. Y. 468.

<sup>2</sup> *People v. Jenness*, 5 Mich. 305; *State v. Williams*, 42 Conn. 261; *People v. Hare*, 57 Mich. 518.

<sup>3</sup> *Knowles v. The People*, 15 Mich. 412; *Hamilton v. People*, 29 Mich. 173; *People v. Sprague*, 53 Cal. 491; *State v. Gee*, 85 Mo. 647; *People v. Righetti*, 66 Cal. 185.

<sup>4</sup> *State v. Nash*, 8 Ired. (N. C.) 35; *State v. Ellington*, 7 Ired. (N. C.) 67; *Plo v. Bush*, 71 Cal. 602.



pointing out this fact to the jury as being a circumstance likely to affect their credit.<sup>1</sup> And in some cases courts have been allowed to tell juries that proof of casual admissions constituted weak evidence.<sup>2</sup> A jury may properly be cautioned concerning the care to be exercised in considering the testimony of disagreeing witnesses;<sup>3</sup> and they may be told that the mode of impeaching a witness by proof of contradictory statements is liable to "close search and careful scrutiny."<sup>4</sup>

In the light of the above rulings the question recurs, whether a trial court can tell a jury that expert testimony is to be received with caution, or that it is of little value, or that it is of great value.

§ 199. **Reasons why Expert Testimony Should be Received with Caution.**—It is asserted, and with much truth, that experience has shown it to be an easy matter for opposing parties to array expert against expert, and opinion against opinion, to almost unlimited extent. Thus, Mr. Justice Miller, after stating that he, himself, had no confidence in the impression produced by any number of *ex parte* affidavits of experts, has said: "My own experience, both in the local courts and in the Supreme Court of the United States, is, that whenever the matter in contest involves an immense sum in value, and when the question turns mainly upon opinions of experts there is no difficulty in introducing any amount of them on either side."<sup>5</sup> Again, it is

<sup>1</sup> State v. Nat, 6 Jones (N. C.), 114.

<sup>2</sup> Haven v. Markstrum, 67 Wis. 493; Jones v. Knauss, 31 N. J. Eq. 609. But see Tenor v. Johnson, 107 Ind. 69; Lewis v. Christie, 99 Ind. 377.

<sup>3</sup> Johnson v. McKee, 27 Mich. 471.

<sup>4</sup> Keator v. People, 32 Mich. 487.

<sup>5</sup> Middlings Purifier Co. v. Christian, 4 Dillon, 448, 459 (1877.) And in Beaubien v. Cicotte, 12 Mich. 459, 502, Judge Campbell alludes to

said, that expert witnesses are in the employ of those who summon them, and, therefore, as a class, are not as free from bias as ordinary witnesses. Being in the employ of those who call them, they are found more liable to bias, and more disposed to act as hired advocates than are disinterested witnesses. Thus, in a case in the Supreme Court of California, that court has said: "Expert witnesses ought to be selected by the court, and should be impartial as well as learned and skilful. A contrary practice, however, is now, probably, too well established to allow the more salutary rule to be enforced, but it must be painfully evident to every practitioner that these witnesses are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed, and, as a matter of course, no expert is called until the party calling him is assured that his opinion will be favorable."<sup>1</sup> So true is this that, as is elsewhere shown,<sup>2</sup> in some countries the experts are designated by the court, the parties not being free to summon whomsoever they please. Again, an expert is called to give opinion testimony, while ordinary witnesses testify, as a rule, only to facts. Not only is testimony to matter of fact apt to be more reliable in the very nature of things than is testimony concerning that which is mere matter of opinion, but the same safeguards in the fact, "that in all important litigations the experts are found arrayed against each other."

<sup>1</sup> Grigsby v. Clear Lake Water Co., 40 Cal. 405.

<sup>2</sup> See section 41, p. 92.

the way of punishment for perjury cannot be thrown around the one class of testimony that can be in the case of the other. Thus it has been said that, "as a rule, where an issue is capable of being proved by facts, evidence of a lesser degree, or of a more uncertain character, ought not to be admitted. Liability of a witness to the penalties of perjury, if he corruptly misstate facts, is one of the securities for truth which ought not to be removed unless on necessity. And in proportion as opinion is admitted, that liability is removed."<sup>1</sup> Moreover, expert testimony is largely based on hypothetical statements of fact, and the value of the opinion based thereon must depend, at the best, on the truth of the facts assumed, which, therefore, need to be carefully scrutinized.

It is not surprising, therefore, to find the courts saying that, as this kind of evidence is fraught with danger,<sup>2</sup> it ought to be received with caution, at least in cases where the testimony does not relate to precise scientific facts, or to the necessary conclusions which result from facts stated, but consists in mere matter of opinion as to the probable inferences which are to be drawn from certain facts, or is speculative and theoretical in its nature. We shall see that courts have not hesitated in such cases to instruct juries that expert testimony should be received with caution. But we do not understand that an instruction to a jury that expert testimony is to be received with caution, is

<sup>1</sup> Hayes v. Wells, 34 Md. 513.

<sup>2</sup> "The rule which admits professional opinions to be received as evidence, a kind of evidence so little reliable, and so fraught with danger to those whose rights and interests it is to affect or control, ought not to be extended." Parker v. Johnson, 25 Ga. 583. And see People v. Morigan, 29 Mich. 5.



equivalent to telling them that such testimony is of no value, or even of very little value. After cautiously considering such testimony, to see upon what it rests, the reasons given for it, the experience of the witness, his means of knowledge, his skill, his freedom from bias, the testimony may be of great or of little value, as the case may be.

§ 200. **Cases Holding that Expert Testimony Should be Received with Caution.**—For reasons stated in the preceding section, it has been declared in a number of cases that expert testimony is to be received with caution, and even, as sometimes expressed, with great caution.

Thus, in a case in the Irish court of exchequer it is stated generally that “all evidence of *opinion* ought to be received and considered with narrow scrutiny, and with much caution.”<sup>1</sup>

The Supreme Court of South Carolina declare that “all testimony founded upon opinion merely is weak and uncertain, and should in every case be weighed with great caution.”<sup>2</sup>

The Supreme Court of Mississippi, speaking of the evidence of experts in handwriting, declares that it “ought to be received and weighed cautiously by the jury.”<sup>3</sup>

In a case in California which involved the competency of a civil engineer to testify as an expert as to the effect of obstructions in causing back-water, the court, discussing expert testimony in general, say: “such evidence should be received with caution by the jury, and never allowed, except upon subjects

<sup>1</sup> *McFadden v. Murdock*, 1 R. 1 C. L. 211, 218 (1867).

<sup>2</sup> *Benedict v. Flanigan*, 18 S. C. 506.

<sup>3</sup> *Moye v. Herndon*, 30 Miss. 118.

which require unusual scientific attainments or peculiar skill."<sup>1</sup>

The Supreme Court of Ohio say: "Medical testimony is of too much importance to be disregarded. When delivered with caution, and without bias in favor of either party, or in aid of some speculation and favorite theory, it becomes a salutary means of preventing even intelligent juries from following a popular prejudice, and deciding a cause on inconsistent and unsound principles. But it should be given with great care and *received with the utmost caution*, and, like the opinions of neighbors and acquaintances, should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstructions, and supported by authority of acknowledged credit."<sup>2</sup> The question involved was that of the insanity of the person.

In a recent case in one of the Circuit Courts of the United States where expert testimony in handwriting had been introduced the jury were charged as follows: "Now, gentlemen, assuming that both of these (expert) witnesses are disinterested and unbiased, and otherwise credible, the nature of that class of testimony is such that it should be received and acted upon by you with much caution. Testimony of that kind is not entitled to the same weight as the testimony of persons who speak concerning matters within their personal observation, because these witnesses simply express opinions which they entertain, founded on the comparison made, and you should regard their statements in this matter as *opinions* merely, and give them such weight only as

Grigsby v. Clear Lake Water Co., 40 Cal. 396, 405 (1870).

<sup>2</sup> Clark v. State, 12 Ohio, 483, 491.

you think they deserve, considering the experience which the experts have had in making such comparisons.'"<sup>1</sup>

The Supreme Court of Florida has sustained the following charge to a jury in a capital case: "The testimony of a witness as a man of science on a subject with which he is familiar from knowledge or experience, is admissible, and you can judge of its force and application from the character of the testimony, the case under consideration, and the subject-matter under examination; and you may apply its force as you believe and understand its relation to the case. If they testify to a scientific truth, they are entitled to belief. Yet they may be received with caution.'"<sup>2</sup>

In a case in New York the distinction is brought out between expert testimony as to facts and as to matter of opinion, in a charge to a jury, which was as follows: "There is in regard to the testimony of these physicians a distinction to be made; you are to distinguish between the facts they testify to and their opinions. When a physician testifies in regard to a fact, you are to believe it just as you are to believe any other man of equal credit. When they testify to a fact that they know from their study of disease, and their characteristics, and tell us what there is of the facts, you are to believe it. When they testify in regard to opinions it becomes a different question. \* \* \* In considering their testimony you will consider, in reference to each statement, whether it is a fact or an opinion; you will apply this rule to all the facts connected with

<sup>1</sup> United States v. Pendergast, 32 Fed. Rep. 198, 200 (1887)

<sup>2</sup> Newton v. The State, 21 Fla. 56, 102.



the case that are derived from the investigations of these physicians. \* \* \* We are not bound to believe the opinion of doctors, unless they are compatible with sound sense. Doctors give many opinions which are merely speculative; they have their theories and speculations, and the difficulty with them many times seems to be that they are hardly willing to admit that there is much in the human system, its ailments and diseases, that is beyond their knowledge and comprehension. You are not bound to believe the opinion of a doctor unless it comports with your common sense, and is consistent with the facts in the case."<sup>1</sup> No exception was taken to this instruction.

In a case in the Supreme Court of New York, Mr. Justice Daniels says: "A mere expression of opinion as to the weight or effect of the evidence, which still allows the jury to be guided and governed by their own convictions, forms no proper ground for an exception. That may be proper, and even necessary, under certain circumstances, to enable the jury to give appropriate consideration to evidence requiring their judgment. The evidence of witnesses who are brought upon the stand to support a theory by their opinions, is justly exposed to a reasonable degree of suspicion. They are produced, not to swear to facts observed by them, but to express their judgment as to the effect of those detailed by others, and they are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is, in many instances, the result alone of employment and the bias arising out of it. Such evidence should be cautiously accepted

<sup>1</sup> *People v. Montgomery*, 13 Abbott's Pr. 207, 220, 223.

as the foundation of a verdict, and it forms a very proper subject for the expression of a reasonably guarded opinion by the court. That is often necessary to prevent the jury from being led astray by giving too much weight to evidence really requiring to be suspiciously watched, and which in many instances has induced unwarranted verdicts, discreditable to the administration of justice, as well as exceedingly detrimental to the public interest. When the comments of the court are extended no farther than that, no fault can be found with them on the part of the accused." The case in which this language was used was a criminal one, the accused having been convicted of committing an assault upon his wife with intent to kill. His defense was insanity, and the accused claimed that the trial court had unduly discredited the testimony of the experts sworn on his behalf.<sup>1</sup>

In a recent case the Supreme Court of Michigan passed on the following instruction: "The value of expert testimony depends on the circumstances of each case, and of those circumstances the jury must be the judges. The jury must determine the weight to be accorded to it, but in all cases the testimony of experts is to be received and weighed with great caution. The evidence of a witness who is brought upon the stand to support a theory by his opinion is testimony exposed to a reasonable degree of suspicion, which there is great reason to believe is, in many instances, the result alone of employment and his bias arising out of it. In many cases, it is to be feared, by giving too much weight to testimony of experts, juries have been induced to

<sup>1</sup> *Templeton v. People*, 3 Hun, 357; affirmed 60 N. Y. 643 (1875).

render unwarranted verdicts, discreditable to the administration of justice, as well as exceedingly detrimental to the public interests." The question involved was that of the insanity of the accused, and there was a conflict in the testimony of the experts. The Supreme Court in passing on the above instruction said: "As the case stood we do not think the expressions of the trial judge concerning expert testimony require any censure or animadversion."<sup>1</sup>

§ 201. **Cases Holding that Testimony Should be Considered as Other Testimony and Tried by the Same Tests.**—It has been said in some of the cases that expert testimony is to be considered like any other testimony, and tried by the same tests. It is undoubtedly true that, like any other testimony, it is not conclusive upon the jury unless it is believed, and in forming an opinion upon it, as in forming an opinion upon the testimony of any ordinary witness, the jury will consider the character of the witness, his appearance on the stand, his intelligence, his freedom from bias and his means of knowledge, as well as his liability to mistake in cases where his testimony relates to matter of opinion. In weighing the testimony of experts, as in weighing the testimony of witnesses in general, all these things are to be considered.

In a case in the Circuit Court of the United States in 1871, the question being as to the infringement of a patent, Mr. Justice Sawyer instructed the jury as follows: "The testimony of the experts, which has been introduced, you are to consider like any other evidence. You are to try it by the same tests

<sup>1</sup> *People v. Perriman*, 40 N. W. Rep. 425 (1888).



that you apply to the evidence of other witnesses, and give it just such credit and weight as you deem it entitled to from all the circumstances, and no more.”<sup>1</sup>

In a case in the Supreme Court of Indiana in 1877, the same doctrine was asserted. The court say: “The value of such testimony depends as much upon all the facts and circumstances connected with each particular case as that of any other class of witnesses. It is for the court first to decide whether a witness is competent to testify as an expert; but, when permitted to testify, an expert stands substantially on the same footing as any other witness as to credibility. His testimony may be valuable, or it may not be, depending upon the manner in which it may be able to withstand the usual tests of credibility which may be applied to it. \* \* \* Experts may not well understand the subject about which they testify; they may be biased in favor of the party who calls them: they may base their conclusions on false theories or on mistaken premises, or the facts may be against them. These objections, when well taken, go only to their credibility, and we know of no rule which applies them with greater force to experts than to other witnesses.”<sup>2</sup> And subsequently in the same court this doctrine was adhered to.<sup>3</sup>

In a case in the Supreme Court of Louisiana in 1849 that court declares: “But those opinions (of medical men) are not conclusive. They are to be weighed, as other evidence, by the jury, as the dis-

<sup>1</sup> *Carter v. Baker*, 1 Sawyer, 512, 525.

<sup>2</sup> *Eggers v. Eggers*, 57 Ind. 461.

<sup>3</sup> *Cuneo v. Bessoni*, 63 Ind. 524, 528.

strict judge properly charged.”<sup>1</sup> In another case which came before the same court in 1869 the court observes: “That the opinions of medical men are freely received upon questions of professional skill, it is equally true that they ought also to state the facts on which those opinions are based, and that the opinions themselves are not conclusive, but must be weighed as other evidence.”<sup>2</sup> In the Louisiana cases the point the court had before it was whether the jury were not bound by the testimony of the experts—whether that testimony was not absolutely conclusive on them.

In a case in Kansas that court states that it thinks as good a general rule as can be laid down is that announced by Mr. Justice SAWYER in the case referred to in the beginning of this section, but it goes on to say that there may be cases in which it might be proper to charge that expert testimony should be received with caution.<sup>3</sup> The court did not think it was proper to give such a caution in the particular case, as in that case the testimony was given by physicians of high standing, and the court thought their testimony entitled to great weight. Whether an instruction that a certain class of testimony should be received with caution is equivalent to an instruction that it is entitled to little weight is a matter to be considered later.<sup>4</sup>

§ 202. **Cases Holding that Expert Testimony is Entitled to Little Weight.**—It cannot be denied that expert testimony has been subjected to much unfavorable criticism, and that authors and courts have

<sup>1</sup> State v. Bailey, 4 La. Ann. 376.

<sup>2</sup> Chandler v. Barrett, 21 La. Ann. 58, 62.

<sup>3</sup> Atchison, etc. R. R. Co. v. Thul, 32 Kan. 255, 261.

<sup>4</sup> See section 206.

in some cases not hesitated to assert that it is entitled to but little credit. While much of the censure that has been visited upon this class of testimony may well be excused, yet it is a mistake to assume that expert testimony as a whole is of little value. For there are many classes of cases in which such testimony is of the highest value, and where courts could not get along at all without it. That in many cases such testimony is of little value, and even of no value, every one, who has had any experience with expert testimony, knows. In some subjects, especially in cases relating to patents and handwriting, this class of testimony has been much discredited. And in some cases courts have instructed juries concerning the unsatisfactory character of this kind of evidence.

For instance, the following instruction has been sustained: "Evidence of this character (comparison of handwriting by experts) has been introduced in the case at bar, and it will be for you to say how much weight shall be given to such testimony, taking into consideration the amount of skill possessed by the witnesses. But while it is proper to consider such evidence, and to give it such weight as you may think it justly entitled, yet it is proper to remark that it is of the lowest order of evidence, or evidence of the most unsatisfactory character. It cannot be claimed that it ought to overthrow positive and direct evidence of credible witnesses who testify from their personal knowledge, but it is most useful in cases of conflict between witnesses as corroborating witnesses." Counsel claimed that the above instruction was erroneous, as it practically destroyed expert evidence, by taking from it the



force and weight given to it by law. But in sustaining the instruction the court says: "The observation and experience of daily life, as well as in the administration of justice in the courts of law, must be applied by judges and jurors to enable them to decide to what extent the mind should be influenced by evidence submitted to them. \* \* \* The effect, then, which all evidence has upon the mind is determined by observation and experience, the only original instructors of wisdom. These teach that the evidence of experts is of the very lowest order, and the most unsatisfactory character. We believe that in this opinion experienced laymen unite with members of the legal profession."<sup>1</sup> And in Vermont the Supreme Court of that State declared, that if the trial judge had "told the jury, what to be sure is unusual, as expressed in an early case, that it (testimony of experts in handwriting) was entitled to but little weight as proof of the disputed fact, but, after all leaving it for them to weigh and consider, it would not have been an error."<sup>2</sup> The same court in a late case say: "It would be trite to repeat the very uniform expression of judges and the books as to the small value of this kind of evidence, yet it is warrantable to say that such expression is corroborated by our own observation and experience in judicial administration."<sup>3</sup> In a case in the United States Circuit Court Mr. Justice GRIER in speaking of expert testimony in the matter of handwriting, says: "Whether the signatures appear to be done by the same hand, that, I think, is a question you can put

<sup>1</sup> Whittaker v. Parker, 42 Iowa, 586. See, too, Borland v. Walwrath, 33 Iowa, 133.

<sup>2</sup> Pratt v. Rawson, 40 Vt. 183, 188.

<sup>3</sup> Wright v. Williams' Estate, 47 Vt. 222, 234.

to an expert, though the testimony is of rather a dangerous character and not much to be relied on.”<sup>1</sup>

In another case the same justice says: “Opinions with regard to handwriting are the weakest and least reliable of all evidence as against direct proof of the execution of an instrument.”<sup>2</sup> In the New Jersey Court of Chancery the following statement has been made: “All doubt respecting the competency of the opinion of experts in handwriting based upon mere comparison, as evidence, have been removed by statute; but it still must be esteemed proof of low degree. Very learned judges have characterized it as much too uncertain, even when only slightly opposed, to be the foundation of a judicial decision.”<sup>3</sup>

In a case in the Supreme Court of the District of Columbia it has been said: “The signatures of these papers are claimed not to be genuine, and here we are treated to the opinion of half a dozen men who claim to be experts, and who come up and give us their views as to the genuineness of these signatures. Of all kinds of evidence admitted in a court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence.”<sup>4</sup> And, notwithstanding the evidence of the experts, the court declared that it was satisfied as to the genuineness of the signatures. In the Supreme Court of Michigan it is said: “Every one knows how very unsafe it is to rely upon any one’s opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief, instead of palliating it, and the re-

<sup>1</sup> *United States v. Darnaud*, 3 Wall. Jr. 143, 183.

<sup>2</sup> *Turner v. Hanó*, 3 Wall. Jr. 88, 115.

<sup>3</sup> *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193, 201.

<sup>4</sup> *Cowan v. Beall*, 1 McArthur, 270, 274.

sults of litigation have shown that these are often the merest pretenders to knowledge, whose notions are pure speculation. Opinions are necessarily received, and may be valuable, but at best this kind of testimony is a necessary evil.”<sup>1</sup> Lord President Boyle in the Scotch court says: “A set of engravers have been examined on both sides, to whose testimony I pay very little attention, as their opinions are very little to be depended upon. In this as in all other cases they take different sides. It seems to be a part of their profession to take different sides.”<sup>2</sup> In a case in England, in 1822, ABBOTT, C. J., speaking of expert testimony on the subject of handwriting said of it: “I have been long of the opinion that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it.”<sup>3</sup> And in the famous Tracy Peerage case, in the House of Lords, in 1843, the case depending on the genuineness of entries written in an old prayer book, and dated 1728 and 1729, Lord Campbell said: “There was a witness (Sir Frederick Madden) who undertook to say that it was the handwriting of about the middle of the last century. I do not mean to throw any reflection on Sir Frederick Madden. I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion I have entertained, that hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are

<sup>1</sup> Matter of Alfred Foster's Will, 34 Mich. 21, 25.

<sup>2</sup> Turnbull v. Dods, 6 Dunlop, 901.

<sup>3</sup> Gurney v. Langlands, 5 Barn. Ald. 330.



embarked.” In the opinion of the New York Court of Appeals recently delivered in the famous *Kemmler* case, Mr. Justice GRAY has this to say of expert testimony: “Expert evidence is only, it seems to me, entitled to much importance in arriving at a judgment, when fairly given by one properly accredited to give it, through his experience, study and scientific eminence, and upon a hypothesis which shall be true in the relation of its parts to the whole case which is the subject of inquiry. The frequent spectacle of scientific experts differing in their opinions upon a case, according to the side upon which retained, tends much to discredit such testimony, or to impair its force and usefulness, and inclines us to prefer the formation of an opinion upon the real facts, when the case is not one beyond the penetration and grasp of the ordinary mind.”<sup>2</sup>

In *People v. Morrigan*,<sup>3</sup> the Supreme Court of Michigan, through Judge COOLEY, thus expressed themselves on the subject of expert testimony: “The experience of courts with the testimony of experts has not been such as to impress them with the conviction that the scope of such proofs should be extended. Such testimony is not desirable in any case where the jury can get along without it; and is only admitted from necessity, and then only when it is likely to be of some value.” In a subsequent case the trial judge read to the jury the remarks of the Supreme Court in *Morrigan's case*, and exception was taken to his so doing, and the case carried to the Supreme Court, which held that the trial judge had committed no error. In the second

<sup>1</sup> 10 C. & F. 154, 191.

<sup>2</sup> *People v. Kemmler*, 119 N. Y. 580, 583 (1890).

<sup>3</sup> 29 Mich. 8.

case the court say, Judge COOLEY again giving the opinion: "Three exceptions were taken to portions of the charge to the jury. One of these was to the judge reading to the jury remarks of this court concerning the testimony of experts contained in the report of the case of *People v. Morrigan*, 29 Mich. 8. The objection seems to have been that the judge read a certain paragraph *calculated to depreciate the value of expert evidence*, without giving the context, or a statement of the facts which called out the remarks read. *But the judge had an undoubted right to make the same remarks himself as a part of his charge, and it was immaterial whether they were original with him, or were taken at second-hand from some other judge or other authority or author.*"<sup>1</sup>

Law writers have likewise expressed unfavorable opinions of expert testimony. The leading authority in England on the law of evidence thus writes: "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak, not to facts, but to *opinions*; and when this is the case it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think; but their judgments become so warped by regarding the subject in one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion. Being zealous partisans, their belief becomes synonymous with

<sup>1</sup> *People v. Niles*, 44 Mich. 606, 609 (1880).

Faith as defined by the Apostle, and it too often is but 'the substance of things *hoped for*, the evidence of things *not seen*.' To adopt the language of Lord Campbell,<sup>1</sup> 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.'<sup>2</sup> And in another part of his work the author again declares that such evidence is entitled to very little weight.<sup>3</sup> In still another part of his work he says: "Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little weight will in general be attached to the evidence which they give, unless it be obviously based on sensible reasoning."<sup>4</sup>

A writer in the *Journal of Jurisprudence* (Edinburgh), for August, 1881, discusses the value of expert testimony as to handwriting as follows:

"Evidence as to handwriting is extremely fallacious, and there are some forgers extremely good at their trade. In the case of *Englemore v. Kingston*, 8 Vesey, 473, Lord Eldon, commenting on the uncertainty and untrustworthiness of testimony as to handwriting, said: 'A singular circumstance applicable to this point happened to me. A deed was tried at Westminster throwing a good deal of blot on the persons who obtained it. The solicitor, a very respectable man, said he felt satisfaction that there were respectable witnesses. One was the town clerk of Newcastle, and I was the other. I could undertake to a certainty that the signature was not

<sup>1</sup> Tracy Peerage Case, 10 Cl. & Fin. 191.

<sup>2</sup> 1 Taylor on Evidence, § 58.

<sup>3</sup> *Ibid.* § 650.

<sup>4</sup> *Ibid.* § 1877.



mine, having never attested a deed in my life. He looked back to my pleadings; was sure it was my signature; and if I had been dead, would have sworn to it conscientiously.' Nay, further, the imitation of handwriting is sometimes so adroit as to deceive, not only persons familiar with the handwriting, but even the person whose name is forged. The factor on a large estate had a clerk possessed of a wonderful facility for imitating handwriting. The factor being an old and infirm man, used to tell the clerk to sign checks for him, which he did in such a manner that nobody could tell the difference between the real and the imitated signature. The clerk used also to amuse himself by imitating the signature of his master's son. The signatures were very difficult, one being in the shaky writing of an old and infirm man, the other in the firm hand of a strong, vigorous young man; but both were so perfect that neither could distinguish the imitated signatures from their own. One very remarkable instance of a person being deceived by the forgery of his own signature happened in Scotland a few years ago. We can vouch for the truth of the story. The agent of a public company issued some forged bills, to which were appended the names of three of the directors. He decamped, but was caught in Paris. One of these directors, a man of position and capacity, a magistrate of a northern town, was certain that the names of the other directors were forged, but that his own signature was genuine, although he could not imagine when or how he had come to sign the bill. The director went to Paris, and in order to have the culprit removed to this country he (was) required to make a declaration be-

fore a magistrate. He swore that the other two signatures were forgeries, but that his own signature—a very peculiar signature—was genuine. The culprit, who knew that the game was up, and had no objection to making a clean breast of it, was very much amused, and informed the excellent magistrate that he had made a mistake, and that the whole of the signatures were forgeries. ‘But how did you manage to do it?’ was the natural inquiry. The man took a pen and a piece of paper, and without a moment’s hesitation, scribbled off a signature which the victim, if he had not seen the act done, would have said was his own. In Scotland the courts have for long placed very little reliance upon evidence as to handwriting, and hardly any at all upon the evidence of mere ‘experts.’ Perhaps it would be more correct to say that the judges have either refused to receive the evidence of experts, or have intimated that such evidence would produce no impression on their minds.”<sup>1</sup>

In the *Law Magazine and Review* (London), for February, 1878, will be found the following estimate of expert evidence: “It cannot be denied that there is on the part of the bench a strong *a priori* distrust of expert evidence in general. It is no doubt in the abstract, the form of testimony least deserving of credit, because it speaks mainly to opinion and not to facts, and is almost necessarily inconclusive. On some subjects, of course, positive or direct testimony is often unattainable, and the cause of justice is then much indebted to a witness who can intelligently and with reason, testify to his belief or opinion, or draw inferences from similar facts within his

<sup>1</sup> 25 *Journal of Jurisprudence*, 409, 413, 414.

own experience. But a judge may certainly find justification for his distrust in much that too often accompanies the appearance of experts in an action. They have done not a little of late towards weakening their already limited value as witnesses. That absolute independence which we have seen should be the very foundation of their worth is generally wanting. If they are men of any eminence, the tendency at least of their opinions is already known to those who employ them. It is, indeed, often on such tendency that their eminence depends. Possibly, if they are eminent, and, probably, if they are not, their judgment is biased towards their employers, *ita præcurrit amicitia iudicium, tollit que experiendi potestatem*. Men readily believe what they anxiously desire, and such witnesses forget their real character, and seem to consider themselves paid agents. The result may be seen in the extraordinary consequences which arise from the careful choice by suitable agents of their deliverers of opinions to order. It is not an unusual circumstance to find them in the continuous employ of some constantly litigant body, *e. g.*, a gas or water company. If otherwise, they are seldom called in until litigation has been threatened or actually commenced, instead of appearing as assistants of the court in determining upon what is most for the public good. The wildest theories are enunciated; science and health are insulted in the interests of costs and personal notoriety; dust is purposely thrown in those eyes which ask for light, and the unavoidable inexperience of the court is compelled to a decision, which those who really cause it know to be wrong, or, at least, do not think to be right. On some



special branches of inquiry the same two eminent experts, whose views are as well known as those of two rival village politicians, confront each other daily. And, lastly, although their evidence is given upon oath, the sanction of this need presents no terror to their minds. \* \* \* When the evidence is only as to a matter of opinion, the witness, of course, cannot be indicted for perjury, and it is clear that this will allow the assertion of anything which a skilled witness may think likely to advantage the cause of his employer, or add importance to his theories and himself. The serious mischief caused in this way, added to the frequent inability of the court to obtain any other kind of evidence, or to arrive at a conclusion which does not depend mainly on such testimony, naturally produces great dissatisfaction with any decision in an expert action."<sup>1</sup>

§ 203. **Cases Holding that Expert Testimony in Matters of Medical Science is of Great Value.**—On the other hand many cases may be found in which courts have expressed the opinion that the testimony of experts in medical science is of great value, or entitled to great weight. These cases must now be noticed.

In a case before the Supreme Court of New York in 1872, the court was called upon to say whether the following instruction should have been given: "Considering the extraordinary character of the injuries alleged in this case, and the great difficulty attendant upon their proper investigation, great weight should be given by the jury to the opinion of scientific witnesses, accustomed to investigate the causes and effects of injuries to the eye, and a dis-

<sup>1</sup> The interesting article from which the above extract is made is written by Mr. G. Brooke Freeman, *Law Mag. & Rev.*, Feb., 1878.

inction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries of science and most improved methods of treatment and investigation."

In this case the plaintiff had called a physician, who stated on cross-examination that in his examination of the eyes he had not used the ophthalmoscope, or stereoscope, and did not make a specialty of diseases of the eye. While the defendant had called a physician who testified that he had made a specialty of such diseases, that he had used ophthalmoscope and stereoscope. The court decided that the trial court committed an error in not giving the above requested instruction, saying: "The proposition there laid down was correct and should have been presented to the jury."<sup>1</sup>

In a case before the Supreme Court of Mississippi in 1870, that court say: "Prominent among the testimony necessarily made use of at this stage of investigation, is that of medical and scientific persons, surgeons, physicians and chemists, by whom the body or its remains have been inspected and examined, either at the time of the discovery or shortly after. The testimony of these witnesses, as to the appearances observed on such examinations, is always of the greatest value, and their opinions as to the causes of such appearances are entitled to much consideration."<sup>2</sup>

In a case in the Supreme Court of North Carolina in 1879, that court sustained an instruction reading as follows: "The law likewise attaches peculiar

<sup>1</sup> *Tinney v. New Jersey Steam-boat Co.*, 12 Abbott's Pr. (N. S.) 1.

<sup>2</sup> *Pitts v. State*, 43 Miss. 472, 480.

importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity, as by study and experience in the practice of their profession they become experts in the matter of bodily and mental ailments." The court in sustaining this instruction say: "Nor do we consider the criticism upon the language of the judge as invading the province of the jury well founded. Mere opinions predicated upon the testimony of others, when they proceed from those who have special skill and experience in a profession or employment, are competent and proper to be heard by the jury, and are often valuable aids in conducting them to a correct conclusion. There are, however, hypothetical opinions only, dependent upon the fullness and accuracy of the facts to which they apply for their value, and it is to this kind of evidence that the disparaging remarks quoted by the defendant's counsel from certain law writers are mainly directed. But the opinion of a well instructed and experienced medical man upon a matter within the scope of his profession, and based on personal observation and knowledge, is and ought to be carefully considered and weighed by the jury in rendering their verdict; and this substantially is the comment of the court. \* \* \* It cannot admit of question that the opinion of the medical expert who attended the deceased during his last fatal illness, and must have become familiar with his disease and its effects upon both body and mind, should have greater weight and possess a higher value in determining his mental as well as physical condition than the opinion of an unprofessional man. As this is the dictate of common reason, it was not



improper in the judge to say so. The charge manifestly refers to the *opinion itself* as *evidence* in the cause, and not to the credibility of the witness who gives the opinion. The credit due to the witness belongs to the jury to determine and with them it is left."<sup>1</sup>

In a case in the Supreme Court of Pennsylvania in 1878, where the question in the court below was as to the insanity of the prisoner, the trial court had told the jury that it doubted "very much whether you will realize much, if any, valuable aid from them (the medical experts) in coming to a correct conclusion as regards the responsibility for crime by this prisoner," and this was held to be error. And the court say: "It is well settled that the knowledge and experience of medical experts is of great value in questions of insanity. They are like those of experts in all other branches of science and of art. Evidence had been given of the observation, experience and skill of these medical experts, sufficient to enable them to form intelligent opinions, and they had testified to those opinions. We cannot understand on what principle the learned judge said to the jury that in this case he questioned very much whether they would realize much, if any, valuable aid from the testimony. True, the jury were not bound to adopt the conclusions of the experts; yet they should have been instructed to give a careful consideration to the testimony of those who had made the diseases of the human mind a special study. In a former part of the charge the jury was told that 'great respect should be paid to the opinion of that class of witnesses,' followed by other remarks equally

<sup>1</sup> Flynt v. Bodenhamer, 80 N. C. 205.

correct. Yet, when the court came to apply the testimony to the case trying, its effect was almost destroyed. We see no especial circumstances in this case to justify taking from the evidence of these medical witnesses that consideration to which the testimony of experts is generally entitled.”<sup>1</sup>

The Supreme Court of West Virginia makes the following statement: “The evidence of witnesses present at the execution of the deed are entitled to peculiar weight. The evidence of physicians, especially those who attended the grantor, and were with him considerably during the time it is charged he was of unsound mind, is entitled to great weight; next to physicians and those who were present, either as attesting witnesses or otherwise, at the time the deed was executed, are those whose intimacy in the family has given them an opportunity of seeing the party at all times, and watching the operations of his mind. Of course, it is understood that in the weight to be given to the testimony of the different classes of witnesses we have here enumerated, that the witnesses themselves have no discredit cast upon them, either in cross-examination, the circumstance they detail or in any other way. But the mere opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them; and if the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth but little or nothing.”<sup>2</sup>

And the Court of Appeals of Virginia have said:

<sup>1</sup> Parnell v. Commonwealth, 86 Pa. St. 260, 269.

<sup>2</sup> Jarrett v. Jarrett, 11 W. Va. 584, 626. And see Kerr v. Lunsford, 31 W. Va. 659, 681; Nicholas v. Kershner, 20 W. Va. 251, 255.

“The opinion of a witness as to the sanity of a person, depends for its weight on the capacity of the witness to judge, and his opportunity. Physicians are considered as occupying a high grade on such questions, both because they are generally men of cultivated minds and observation, and because, from their education and pursuits, they are supposed to have turned their attention more particularly to such subjects, and therefore to be able to discriminate more accurately, especially a physician who has attended the patient through the disease which is supposed to have disabled his mind.”<sup>1</sup> In a subsequent case in the same court this doctrine is approved.<sup>2</sup>

In the Supreme Court of Texas, where the question was as to the sanity of the accused, the court said: “The opinions of medical men are received with great respect and consideration, and properly so.”<sup>3</sup>

In a case in Delaware in 1851, the jury were instructed as follows: “The opinions of witnesses, who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease at the time of its supposed existence. \* \* \* Such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of a jury. But the opinion

<sup>1</sup> *Burton v. Scott*, 3 Rand. (Va.) 399, 403.

<sup>2</sup> *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56, 65.

<sup>3</sup> *Thomas v. State*, 40 Tex. 61, 65.



of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity and impartiality of the witness who gives it."<sup>1</sup>

In a case in Georgia the trial court charged as follows: "Though great respect is due the opinions of gentlemen of the faculty, skilled in such matters by reason of their superior skill and advantage for understanding the operations and the phenomena of the human mind, yet it is at last from the facts proven that a jury are mainly to decide. They are not bound by any opinion, unless that opinion is sustained by the facts proven." No objection seems to have been taken to the charge, and in the court above the medical testimony was thus referred to: "As it respects this species of testimony generally, the doctrine is this: It is competent testimony; and when the experience, honesty and impartiality of the witnesses are undeniable, as in this case, the testimony is entitled to great weight and consideration."<sup>2</sup>

In a case coming before the Supreme Court of Arkansas in 1860, that court's attention was called to an instruction reading as follows: "That the opinion of practicing physicians is *good evidence* on the points pertaining to their profession, and as such they will consider the opinions given by the physicians in this case." The Supreme Court in passing on this instruction said it did not know what the court meant the jury to understand by the above,

<sup>1</sup> State v. Windsor, 5 Harr. 512, 542.

<sup>2</sup> Choice v. The State, 31 Ga. 424, 481.

and that it should be inclined to think that the jury might have been misled by it were it not for the fact that they were also informed that it was their province to give to the testimony of the physicians such weight as they thought it entitled to. The Supreme Court said farther that the weight to be attached to the opinions of the physicians (as to the physical condition of a slave) "would depend upon their skill, experience, the examination which they gave the patient, their opportunity for observing the symptoms and effects of the disease, their mental capacity, etc., etc. In many cases the opinions of professional men are entitled to great consideration and respect; in others but little."<sup>1</sup>

§ 204. **Cases Denying that the Testimony of Physicians as to Mental Condition is Entitled to Greater Weight than that of Ordinary Witnesses.**—We have seen in the preceding section<sup>2</sup> that courts have asserted that the opinions of physicians on questions of mental capacity are entitled to greater weight than those of ordinary witnesses.

An examination of those cases, however, shows that the opinions of medical men are considered entitled to greater weight than the opinions of non-professional persons, provided the physicians have had personal observation and knowledge of the person whose capacity is the matter in issue. The cases which follow show that if the medical men have not had such personal observation and knowledge of the individual, their testimony has not been considered as entitled to greater weight than is the testimony of ordinary witnesses who have personally observed and known the individual in question.

<sup>1</sup> *Tatum v. Mohr*, 21 Ark. 349, 354.

<sup>2</sup> See pp. 471-475.

The Supreme Court of Indiana was called upon in 1884 to consider this matter, and it said: "It would have been error for the court to tell the jury that the expert witnesses, speaking merely as to matters of opinion, and basing their opinions on hypothetical questions, were entitled to more credit than witnesses who had knowledge of facts gathered from personal observation, and who based their opinions on actual facts and not supposed cases. As both kinds of evidence are competent, the jury are charged with the duty of determining the weight and effect of the evidence in each particular case, and the court has no right to charge them to give preference to the one class or the other."<sup>1</sup>

So the Supreme Court of Illinois say upon the same subject: "The court charged the jury, in substance, that, all other things being equal, they should give greater weight to the opinions of physicians, on the subject of the testamentary capacity of the testatrix than to other witnesses. This position is not sustained by authority or reason. Physicians may be regarded experts as to the condition of the body, and as to what diseases tend to impair the mind, but it does not follow, from the mere fact that they are physicians, that they are any better judges of the degree of mental capacity than other men of good common sense."<sup>2</sup> The same court in a previous case said: "These doctors were summoned by the contestants as 'experts,' for the purpose of invalidating a will deliberately made by a man quite as competent as either of them to do such an act; they were the contestants' witnesses and so considered themselves, Dr. Bassett especially, whose sole testimony

<sup>1</sup> *Goodwin v. The State*, 96 Ind. 550, 561.

<sup>2</sup> *Carpenter v. Calvert*, 83 Ill. 62, 70.



is pregnant with such indications. The testimony of such is worth but little, and should always be received by juries and courts with great caution. It was said by a distinguished judge, in a case before him, if there was any kind of testimony not only of no value, but even worse than that, it was, in his judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly, but, upon the question, whether it had at a given time reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinions of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country. \* \* \* It must be apparent to every one, but few wills could stand the test of the fanciful theories of dogmatic witnesses, who bring discredit on science and make the name of 'expert' a by-word and a reproach. We concur with the judge above referred to; we would not give the testimony of these common sense witnesses, deposing to what they know and saw almost every day for years, for that of so-called *experts*, who always have some favorite theory to support—men often as presumptuous as they are ignorant of the principles of medical science.”<sup>1</sup>

In a case in the Supreme Court of Michigan Mr. Justice CHRISTIANCY said: “We consider it too well settled to require the citation of authorities, that upon questions of this kind the opinions of men skilled in that particular science—in other words, physicians are admitted in evidence, though not founded upon their own personal observation of the facts of the particular case. But if the question

<sup>1</sup> *Rutherford v. Morris*, 77 Ill. 397, 404.

had not already been closed by authority, I should be much inclined to doubt the propriety of receiving the opinions of merely medical witnesses, under such circumstances, to anything more than physical facts, such as the physical effects of the disease, as I think it may well be doubted whether the skill of ordinary physicians in metaphysics, or their judgment upon merely mental manifestations has been shown by experience to be of any greater value than that of intelligent men in other departments of life. The question, however, seems to be settled in their favor upon authority."<sup>1</sup> In an earlier case in the same court Mr. Justice CAMPBELL said: "And in regard to the kind of weakness alleged to have existed in the case of Mr. Beaubien (*senile dementia*), there has been a very general feeling that very little aid can be had from strictly scientific witnesses, beyond that furnished by ordinary experience."<sup>2</sup>

In a case, in the Circuit Court of the United States in 1815, in which mental derangement was involved, Mr. Justice WASHINGTON charged the jury as follows: "Whether the grantor in this case was affected in one way or the other may well be doubted. If the physician who saw him, and who has given testimony respecting the situation, had had an opportunity to examine his case and to form a deliberate opinion upon it, that opinion, pronounced by a man of his acknowledged professional talents, would have been almost conclusive upon this point. But he saw him once only, and then for a very short time; there was little or no conversation between them; and this witness gave it as his opinion that he was incapable of conversing. \* \* \* In weigh-

<sup>1</sup> *Kempsey v. McGinniss*, 21 Mich. 123, 137.

<sup>2</sup> *Beaubien v. Cicotte*, 12 Mich. 459, 502 (1864).

ing the contradictory evidence upon which they have to decide, that which contains facts upon which they may judge for themselves and are given by witnesses, who by frequently seeing and conversing with the grantor had a full opportunity of forming a judgment as to his state of mind, ought to prevail with the jury, over general opinions upon the same subject formed by persons who had fewer opportunities of judging.”<sup>1</sup>

§ 305. **The Testimony of a Family Physician as to Mental Condition—Weight Accorded to.**—In some cases the courts have declared that the testimony of a family physician who attended the person whose condition is in issue is entitled to greater weight than is the testimony of other physicians who have not had as good opportunities for making themselves acquainted with such person’s actual condition.

Thus, the Massachusetts court say: “Supposing the question was as to the gradual decay of the faculties of the testator from disease or old age, one cannot but see that the opinion of an intelligent family physician, familiar with his patient’s infirmities, and watching them at every stage of their progress, would and should have far greater weight with a jury than that of any number of physicians who had made insanity a special study, but who were called to give an opinion upon what is always, and necessarily, an imperfect statement of the facts and symptoms. Or, if the case were one of an original defective capacity, the judgment and opinion of the old family physician would be worth more than that of the masters of the science of insanity, who can have but a fragment of his history.”<sup>2</sup>

<sup>1</sup> Lessee of Hoge v. Fisher, 1 Peters C. C. 163.

<sup>2</sup> Baxter v. Abbott, 7 Gray, 71, 79 (1856).



And in other cases it is asserted that the evidence of attending physicians is entitled to great weight.<sup>1</sup> But while it is proper to instruct the jury as above, yet it has been held error to tell them that the evidence of the attending physician is, in the particular case, entitled to great weight. Thus, in a case in West Virginia, the trial court was asked to instruct the jury that, "in considering the testimony, the evidence of Dr. W. J. Bates, Jr., the physician who attended the testator and was his family physician, is entitled to great weight." The Court of Appeals held that the instruction was properly refused. That court said: "This instruction was properly refused. It was in effect asking the court to tell the jury that Dr. Bates' evidence was entitled to great weight. The court had already, at the instance of the contestants, instructed the jury correctly—and it was as far in that line as it was proper to go—that the evidence of physicians, especially those who attended the testator and were with him during the time it is charged he was of unsound mind, is entitled to great weight.' "

§ 206. **The Different Theories Discussed.**—An examination of the cases referred to in the preceding sections shows an apparently confused state of the law on the subject under consideration. It appears that in different cases different instructions have been given, which are seemingly irreconcilable. These theories are as follows:

1. That expert testimony is to be considered like any other testimony in the case and tried by the same tests.

<sup>1</sup> Jarrett v. Jarrett, 11 W. Va. 584; Beverley v. Walden, 20 Gratt. (Va.) 147, 158, 159.

2. That expert testimony is to be received with caution.

3. That expert testimony is entitled to little weight.

4. That expert testimony is entitled to great weight.

The first of these theories, in the order above named, is in a certain sense true, but in the terms in which it is laid down is liable to be misleading. Expert testimony may relate to facts or to matter of opinion. If it consists of testimony as to facts it would seem to be entitled to the same credit, and should be tried by the same tests as are applied to the testimony of ordinary witnesses testifying concerning matters of fact. If it consists of testimony as to matter of opinion, it is still true that it is entitled to the same credit and is to be tried by the same tests applied to the testimony of ordinary witnesses testifying concerning matter of opinion. But what are the tests applicable to the testimony of ordinary witnesses testifying to matter of opinion? There can be no doubt that where testimony relates to matter of opinion, it is to be received with caution, whether it comes from an expert or a non-expert. A witness testifying to matter of opinion is more liable to be mistaken than is a witness who testifies to facts, to a matter of knowledge. It would seem proper, therefore, in those cases where expert testimony relates to matters of opinion, for the court, after instructing the jury that expert testimony is to be considered like any other testimony and tried by the same tests, to further instruct them that, where such testimony relates to matter of opinion, it is like any other testimony relating to

opinion to be received with caution. It seems to the writer to be a mistake to assume, as has been done in one case,<sup>1</sup> that an instruction that expert testimony is to be received with caution is equivalent to an instruction that such testimony is entitled to little weight, or is of small value. While it is to be received with caution it may be entitled to great value. The jury are to consider with caution in such cases the character of the witnesses, the extent of their knowledge, skill and experience, their freedom from bias, their opportunities for observation, their liabilities to mistake, and having considered all these matters with care they are entitled to give great weight to the testimony, if in their opinion the conditions are such as to justify it.

No general rule can be laid down to the effect that expert testimony is of great value, or that it is of little value. In some cases such testimony is of great value, in others it is entitled to little value, while in some cases it seems to be absolutely valueless. The value of expert testimony depends on a variety of circumstances, which it is the duty of the jury to consider.

1. They should consider the character of the witness for integrity, and freedom from bias.

2. They should consider the extent of his knowledge, his opportunities for observation, his skill and experience.

3. They should consider, if his testimony is based on a hypothetical question, whether the facts which the question assumes to be true, and upon which the opinion of the expert is based, have all been proven in the evidence adduced.

<sup>1</sup> Atchison, etc. R. R. Co. v. Thul, 32 Kan. 255.



4. They should consider whether the testimony of the expert relates to matters of scientific knowledge, or to opinions which are speculative and theoretical in their nature. If the witness testifies to the facts of science, to matters of absolute knowledge, or to the necessary and invariable results following from facts stated, his testimony may be entitled to great weight if the jury are satisfied as to his knowledge, integrity and skill. But if he testifies to matter of opinion simply, to that which is matter of probable inference to speculative and theoretical opinions, his testimony is certainly not of equal value, and may be entitled to but little weight.

A most excellent statement of the proper view to take of expert testimony is to be found in a case in the Circuit Court of the United States, where the jury were charged as follows: "The value, however, of the opinion of experts differs largely in degree in different cases. It is of first importance that the facts upon which they are founded be satisfactorily established. In the present case it does not occur to us that there was any dispute as to the facts in relation to which the expert spoke. It is, next of importance, that the integrity and skill of the witness be known. I may add here, that no question is made of the competency of the witness who has testified here, or of the confidence due to his integrity. But this is not all. Where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts stated, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated,

his opinion is of less importance, because it states only a probability. When the opinion is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury.

Testimony of experts of this latter description, and especially where the speculative and theoretical character of the testimony is illustrated by opinions of experts on both sides of the question, is justly the subject of remark, and has often been condemned by judges as of slight value. Like observations apply, in a greater or less degree, to the opinions of witnesses who are employed for a purpose, and paid for their services, who are brought to testify as witnesses for their employers. This last observation has no pertinency to the present case, and is only made for the purpose of explaining the reason why testimony of this sort has been the subject sometimes of such comments as have been made in your hearing. This condemnation is not always applicable. Often it would be unjust. Where an expert of integrity and skill states conclusions which are the necessary, or even the usual results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited. But, after all, the question of fact in issue is not for the expert to decide. The question of fact in this case is neither for the expert nor for the court. It is for you to decide, upon your sound judgment, under the oaths which you have taken, to render a verdict according to the whole of the evidence submitted to you for consideration."<sup>1</sup>

<sup>1</sup> Gay v. Union Mutual Life Ins. Co., 9 Blatch. 142, 154 (1871).

§ 207. **The Right and Duty of the Jury as to Expert Testimony.**—There are certain principles in regard to the consideration of expert testimony that should be observed:

1. The ultimate weight to be accorded to the testimony of the experts is a question to be determined by the jury.<sup>1</sup>

2. There is no rule of law which requires the jury to surrender their judgment implicitly to the experts, and to give a controlling influence to the opinions of the scientific witnesses.<sup>2</sup>

The jury cannot be required, as a matter of law, to accept the conclusions of the expert witnesses.<sup>3</sup> Their testimony is given for the purpose of enlightening the jury, and not for the purpose of controlling their judgment.<sup>4</sup> Upon the jury rests the responsibility of rendering a correct verdict, and if the testimony of the experts is opposed to the jury's convictions of truth it is their duty to disregard it.<sup>5</sup> In the case last cited will be found an

<sup>1</sup> See § 32, as well as cases cited in the next note.

<sup>2</sup> *Brehm v. Great Western R. R. Co.*, 34 Barb. 256, 272; *Williams v. The State*, 50 Ark. 511, 520; *U. S. v. Molloy*, 31 Fed. Rep. 19; *Chandler v. Barrett*, 21 La. Ann. 58, 62; *Humphries v. Johnson*, 20 Ind. 190; *Goodwin v. State*, 96 Ind. 550, 561; *McAllister v. State*, 17 Ala. 434, 438.

<sup>3</sup> *Anthony v. Stimson*, 4 Kan. 221.

<sup>4</sup> *Fletcher v. Seekel*, 1 R. I. 267; *Choice v. State*, 31 Ga. 424, 481.

<sup>5</sup> *United States v. McGlue*, 1 Curtis C. C. 1, 9. Mr. Justice Curtis charged as follows: "We take the opinions of physicians in this case for the same reason we resort to them in our own cases out of court, because they are believed to be better able to form a correct opinion upon a subject within the scope of their studies and practice than men in general, and, therefore, better than those who compose your panel. But these opinions, though proper for your respectful consideration, and entitled to have in your hands all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and especially when they differ, compared by you, and such effect allowed to them as you think right; not forgetting, that on you alone rests the responsibility of a correct verdict."



excellent charge to a jury, which we have embodied in the note.

3. It is error to instruct a jury that they may wholly disregard the testimony given by the experts, and make their finding from their own observation.<sup>1</sup>

The testimony being in cannot be disregarded by them, but must be considered. After considering it they are at liberty, of course, to reject it, if in their opinion it is unreasonable. And it is not error to charge them that they may disregard the testimony if they deem it unreasonable.<sup>2</sup>

4. It is proper, however, to charge the jury that in considering the evidence and the weight to be accorded to it, they may bring to its consideration such general practical knowledge as they may possess upon the subject.<sup>3</sup>

Thus, in a case in the Supreme Court of the United States, it was held that the following instruction was erroneous, in an action brought to recover for professional services as attorneys at law: "You must determine the value of the services rendered from the evidence that has been offered before you, and not from your own knowledge and ideas as to the value of such services." The opinion of the court was delivered by Mr. Justice FIELD, in the course of which he says: "It was the province of the jury to weigh the testimony of the attorneys as

<sup>1</sup> Hill v. City of Kansas, 80 Mo. 523; Washburn v. The Railroad, 57 Wis. 364.

<sup>2</sup> City of St. Louis v. Ranken, 95 Mo. 189.

<sup>3</sup> Forsyth v. Doolittle, 120 U. S. 73, 77; Laflin v. Chicago, etc. R. R. Co., 33 Fed. Rep. 415; Leitensdorfer v. King, 7 Col. 436; City of Kansas v. Butterfield, 89 Mo. 648; City of St. Louis v. Ranken, 95 Mo. 192; Patterson v. Boston, 20 Pick. (Mass.) 158, 166; Ottawa Gas, etc. Co. v. Graham, 28 Ill. 73.

to the value of the services, by reference to their nature, the time occupied in their performance and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence, in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and, to act intelligently, they must judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty, and probably come to a wrong conclusion, if controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained; they should ignore their own knowledge and experience of the value of

a sound limb. \* \* They should not have been instructed to accept the conclusions of the professional witnesses in place of their own, however much that testimony may have been entitled to consideration. The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors.'"<sup>1</sup>

And where the question was as to the genuineness of a writing it was held that the jurors, having the paper before them for inspection along with genuine writings, were not required to rely solely on the testimony of the experts, but might use their own judgment in deciding upon the effect of a comparison of the writings.<sup>2</sup>

So in a recent case it was decided that no error was committed in holding that the jury could determine just as well as anybody else whether leaves that had been detached, and were fastened in a small book, belonged to it or not, or were likely to have become loosened in a given time. "Expert testimony," said the court, "cannot be of any use

<sup>1</sup> *Head v. Hargrave*, 105 U. S. 45. In this connection attention is called to *Wood v. Barker*, 49 Mich. 295, where the question was as to the value of medical services. In this case the trial court charged the jury in substance that they were at liberty, if not satisfied with the testimony of the experts, to use their own judgment on the question of value. On appeal the Supreme Court said: "There can be no presumption of law concerning the value of a surgeon's services, and there is no presumption that a jury can ascertain it without testimony of some kind, from persons knowing something about such value. As already suggested, there was positive testimony of value not discredited, and, in the case of Dr. Harding, given by a disinterested witness called for important purposes by the defendant himself. We can see no sufficient reason for the suggestion that all of this testimony might be disregarded, and there is no rule which would allow the jury to entirely ignore the testimony, and at the same time to form an independent conclusion without testimony upon a matter which required proof beyond their conjectures or their opinions."

<sup>2</sup> *People v. Gale*, 50 Mich. 237.



in helping, and is improper to be used in preventing a jury from drawing conclusions for themselves from every day appearances open to the judgment of any intelligent observer."<sup>1</sup>

5. But there are cases in which the question at issue is not of such a nature that the "practical common sense" of a jury will enable them to reach a conclusion, and when the conclusion must in the very nature of things depend on the testimony of experts. In such cases, of course, the jury must accept and act upon the testimony of the experts, just as in other cases they must accept and act on the testimony of ordinary witnesses testifying to facts.<sup>2</sup>

6. The value of expert testimony will depend on the experience and knowledge which the witness has and evinces concerning the matter about which he testifies,<sup>3</sup> his freedom from bias, and the reasons which he gives for the conclusions which he has expressed.<sup>4</sup>

7. The opinions of experts cannot prevail over actual facts, and they are never to be regarded when they manifestly conflict with established facts. When facts are shown to the satisfaction of the jury, they must act on them rather than on opinions.<sup>5</sup>

8. Expert testimony is of no value when based

<sup>1</sup> *Passmore v. Passmore's Estate*, 60 Mich. 463, 468.

<sup>2</sup> *Getchell v. Hill*, 21 Minn. 464, 465; *Wood v. Barker*, 49 Mich. 295, 298.

<sup>3</sup> *Union Ins. Co. v. Smith*, 124 U. S. 405, 423; *McGowan v. Am. Tan Bank Co.*, 121 U. S. 575, 609; *Lehigh Valley Coal Co. v. City of Chicago*, 26 Fed. Rep. 415; *State v. Hackett*, 70 Iowa, 442; *Snyder v. State*, 70 Ind. 349.

<sup>4</sup> *Bennison v. Walbank*, 38 Minn. 313.

<sup>5</sup> *Stone v. Chicago, etc. R. R. Co.*, 66 Mich. 76, 82; *Laughlin v. Street Railway Co.*, 62 Mich. 220, 228; *People v. Millard*, 53 Mich. 63, 77; *Treat v. Bates*, 27 Mich. 390.

on the testimony of a witness which is rejected by the jury,<sup>1</sup> or upon a hypothetical question which assumed as true facts not supported by the evidence.<sup>2</sup>

The following instruction has been sustained in reference to expert testimony based on hypothetical questions: "You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, of the averments, are true; and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not correct, and that they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine from all the evidence what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your own minds), that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight," The case being a criminal one the court adds: "Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be; and when there is a reasonable doubt as to the

<sup>1</sup> *Stone v. Chicago, etc. R. R. Co.*, 66 Mich. 76.

<sup>2</sup> *Hitchcock v. Burgett*, 38 Mich. 508.

truth of any one of the material facts stated, resolve it in the defendant's favor.'"<sup>1</sup>

9. A jury is not required to decide a case in favor of the opinions expressed by the greater number of the experts.<sup>2</sup>

The opinion of one expert may be of greater value than the opposite opinion of several witnesses, according as the jury is satisfied that he is possessed of greater knowledge and experience of the subject than are the others, or has stated more probable reasons for his opinion than they have done, or has given fuller details of the case. Hence, it has been held proper to caution the jury that in summing up the testimony on any given question "they should not alone count witnesses, as that is not always the most satisfactory; neither is it the most certain criterion of the truth."<sup>3</sup>

<sup>1</sup> *Guetig v. State*, 66 Ind. 94. See § 32.

<sup>2</sup> *Getchell v. Hill*, 21 Minn. 464, 471.

<sup>3</sup> *State v. Bohan*, 19 Kan. 28, 34. And see *Ely v. Tesch*, 17 Wis. 202; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208.



## APPENDIX.

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### THE IDENTIFICATION OF HAIR.

This subject is considered in section 63, p. 146. The following authorities may be consulted:

*Reissner*.—Beiträge zur Kenntniss der Haare des Menschen u. der Säugethiere, 1854.

*Jaumes*.—De la distinction entre les poils de l'homme et les poils des animaux considérée au point de vue medico légal, 1882.

*Joannel*.—Le poil humain, ses variétés d'aspect, leur signification en médecine judiciaire, 1878.

*Vestorten*.—Das menschliche Haar und seine gerichtärztliche Bedeutung, 1874.

*Virchow*.—Identität oder nicht — Identität von Haaren — (Ges. Abhandl. a. d. Geb. d. öff. med. 1879-ii-552-556.

*Pfaff*.—Das menschliche Haar Leipzig, 1869.

The subject of the identification of hair was involved in the famous Cronin case, recently tried in Chicago, in which Coughlin, O'Sullivan, Burke and Kunze were tried for the murder of Dr. Cronin, a prominent leader in Irish affairs. The following abstract of the testimony of the experts, which is made from the record, may prove of value, and is therefore given:

*Henry L. Tolman* testified that he had had a large amount of experience with the microscope in determining the character of hair. That he had collected and examined the hairs of men, women and children, as well as the leading kinds of hairs of animals from the different sections of the world, so far as he could get them, for the last six or seven years. That human hair could be distinguished by a scientific eye with the aid of a microscope from the hairs of other animals. That human hair standing by itself could be distinguished only by an expert eye through the aid of the microscope when it was of any length. That if it was a half inch or spike shape it could be told by the eye, but when it was two or three inches long it required the aid of the microscope. That the hairs he examined in the Cronin case were human hairs.

*Dr. William T. Belfield*, who had studied the use of the microscope in Vienna, in London and Chicago, and had been a lecturer in Rush Medical College, testified that science could determine whether hair was or

was not human hair, and that the hair he had examined in this case was all human hair. The characteristics of hair as shown by the microscope were their diameters—the markings on the surface, the relation between the central canal, or medulla, as it is termed, to the rest of the hair, the distribution of colored spots through the structure of the hair. That human hairs and those of many other animals were covered with scales on the outside, resembling in a general way the scales of fishes; overlapped like the shingles on a roof. That those scales varied in size, and also in the distance between consecutive overlaps.

*Professor Marshall D. Ewell*, of the Northwestern University, and who was a Fellow of the Royal Microscopical Society of London, England, and a member of the Illinois State Microscopical Society, testified that in the present state of science there was not, to his knowledge, any means by which human hair could be certainly distinguished from all other hair, and that there was no way by which it could be scientifically ascertained with definiteness that two given specimens of hair came from the same head. "Scaly epithelium," he said, "is found in all sorts of animals and reptiles. Every time you comb your head you comb out epithelium; every time you rub your face you rub off scaly epithelium. Every time you expectorate you expectorate epithelium, every time you dust your clothes you shake out epithelium. In my experience it is found everywhere. I have found it in carpet sweeping; or sweepings of the floor in large quantities—not large quantities, but in considerable numbers \* \* \* I don't know of any way, and I can't find any mentioned in the books, whereby it can be scientifically determined whether or not this scaly epithelium is from the human body. The presence of scaly epithelium in a given specimen of blood taken from the floor of a dwelling would not be of any scientific value in determining whether the blood was human blood or not." He also testified that there were certain dog's hairs which could not be distinguished from the human hair when examined under the microscope. "Take a yellow or brown dog," he said, "and you will find quite numerous hairs that under a microscope present identically the same appearance. We determine the differences in hairs by examining the image which is projected to the eye by the microscope. The principal characteristics to distinguish hairs under the microscope are the cortex, configuration and scales on the outside of the central pith, which is called the medulla. In a great deal of the human hair you won't find any medulla; in the majority of them you will not find any medulla. I supposed they had, and you will find the medulla in some of them, but in the most of them that I have examined I did not find them, and therefore you have simply the general pigmentation and configuration of the edges, and these are so nearly alike all others that you cannot tell them apart. As a rule you will find medulla in the hairs of these other animals, but there are enough of them that do not have any medulla to confuse one. A single hair from a horse may, under a microscope, be mistaken for a human hair. \* \* \* There are a good many hairs on a dog that cannot be distinguished from human hairs."

*Professor Harold Moyer*, of Rush Medical College, Chicago, and who had studied Microscopy in Arnold's laboratory in Heidelberg, testified that in the present state of science there was no means by which human hair could be certainly distinguished from all other hair, and none by which it could be scientifically ascertained with definiteness that two given specimens of hair came from the same head. That there was a variation in the diameter of individual hairs taken from a given individual, and that he thought that the variation was as great in the hair of a given individual as the variations between the hairs taken from the heads of different individuals. That under certain circumstances the hair of some of the lower animals was liable to be confounded with and taken for human hair, particularly if there were only a few hairs. That the microscope was of no service in determining the color of hair. That it was impossible to distinguish fuzz or lanugo from all other substances. That there was no distinct structure to lanugo hairs; that they looked very much like a thread of silk, and were not to be distinguished in some instances from threads of silk in any of their optical appearances. That he did not think the fact that a dozen of these little fibres in a specimen of blood derived from the floor of a dwelling would furnish any evidence at all that the fibres themselves were lanugo. That the fibres might have been there before the blood was placed there; that such fibres are found upon furniture and tables and chairs. That the substance called scaly epithelium was not derived alone from the human body, but that it could come from the body of other animals. He also said, "I do not wish to be understood as stating that there are no differences between the hair of animals and the hair of man; that they were identical. What I meant was that there are certain hairs found upon certain animals which it is difficult or impossible to distinguish from the human hair. The medullary sheath varies in size in human hair. I should think that the diameter of the medullary sheath was about one-eighth or one-tenth of the whole diameter of the hair; I don't know as to a horse's hair, nor as to the hair of an ox; I remember how it is in dog's hair. Some dogs' hair resembles very closely in the size and medullary sheath all the characteristics of the human hair. I do not know positively that the hair of any other animal except a dog would be confused with the hair of a man. \* \* \* I think by the aid of a microscope you might, to a great extent, exclude all the hairs of other animals except the dog. I want to say, though, that my examination of hair does not include a great many animals, or a very great number of observations."

*Dr. Lester Curtis*, at one time President of the State Microscopical Society of Illinois, and lecturer in the Chicago Medical College, and who had studied Microscopy in Germany, and had studied with the microscope since 1857, and had lectured upon the subject of hair, testified that he did not think that in the present state of science there were any means by which human hair could be certainly distinguished from all other hairs, or that two given specimens of hair came from the same



head; that the variations of the diameters of the hairs of a given individual were very great; that there were noticeable differences in the structure of the hair of different persons, and that the hair of some lower animals was liable to be confounded with and taken for human hair; that the microscope was of no value in an examination as to the color of the hair, in fact he thought it would be a disadvantage rather than an advantage; that most hair that has much color was opaque, and only could be seen from the surface and the reflection of light from the surface of the hair produced a dazzling effect that was confusing, so that the color and some of the grosser peculiarities could be determined quite as accurately with the naked eye, if not more so, than with the microscope; that lanugo could not be certainly distinguished in a scientific way from all other substances, and that it appeared structureless; that all hair is built on the same general plan. In human hair the medulla is usually present in the larger hairs, but may be absent in the smaller ones. As a general thing the medulla is more plainly marked in the lower animals than it is in the human subject. Some dogs' hair shows the medulla very plainly, some do not. A dog's hair has a medulla somewhat more plainly marked than it is in the human hair, and the epithelium on the outside is a little more sharply defined. This appears only by means of the microscope. A horse's hair also has a medulla more plainly marked than the human hair, but I have seen a good many specimens of horses' hair that had no medulla at all.

#### THE IDENTIFICATION OF BLOOD.

This subject is considered in section 59, p. 139. It has usually been regarded by scientists as possible to distinguish human blood from the blood of certain animals, but not from that of all animals, and we have so stated in the body of this work. This question was raised in the famous Cronin case, already referred to in this appendix, and the testimony of the experts in that case tends to throw doubt over the whole matter, and to show that the former theories on this subject are erroneous. A reference to the testimony may be of some use and is here given:

*Professor Walter Haines*, of the Rush Medical College, testified that there was no chemical test by which a person could accurately determine what kind of blood a given specimen was, whether it was the blood of a bird or the blood of a mammal. The state of health may influence the size of the blood corpuscles. "Writers state that in some classes of disease the corpuscles are frequently much larger than they are in the normal condition, and in other diseased conditions they may be very much smaller than they are in the average normal condition. The corpuscles may vary in size; some of them average very closely. In an infant child the corpuscles are larger than they are in an adult. They are larger in the young of any animal than in the blood of the grown animal.

Corpuscles in the infant are considerably larger than in the adult. \* \* They (corpuscles from ox blood) cannot be distinguished by inspection from that of a man, at least I don't undertake to."

*Henry L. Tolman*, a microscopist, testified: "From the examination made by me, I should say that the blood was human blood, partly because the average of all these measurements bring it above the generally established average of human blood, which is about 3300 or 3350th of an inch, and second because the presence of the hair adds very strong confirmation to that view. \* \* \* The effect of disease upon the size of the corpuscles is to shrink them and change them in color, sometimes in one or two cases it increases their size. I have examined corpuscles taken from a human being in various kinds of disease.

*William T. Belfield, M. D.*, stated he was able to determine what the character of the blood was within certain limits. The nature of the blood he determined by the size, shape and structure of the so-called corpuscles. That the blood corpuscles examined by him in this case were such as might be derived from human blood. "There are several wild animals which furnish corpuscles very closely approximating to that of man—the opossum, the monkey, kangaroo, seal, beaver, porcupine, wolf, and then two domestic animals, the dog and the guinea pig." The figure usually given for human corpuscles is 3200 to the inch. The size varies somewhat; sometimes it may be 3150 to the inch, sometimes 3300 to the inch, but generally speaking we say 3200 to the inch." The dog's corpuscles measure usually 3500 to the inch, a little more or a little less in different individuals. In guinea pigs we say in round numbers 3400 to the inch."

*Professor Marshall D. Ewell, M. D.*, of the Northwestern University stated it as his opinion that in the present state of science it was impossible to determine, in the case of a specimen of dried blood, by the measurement of the blood corpuscles anything more or further than the mere fact that it was the blood of some mammal. He said: "I am very decidedly of the opinion, judging from my experience, that in the present state of science, it is impossible to determine certainly, even under the most favorable circumstances, that any given specimen of fresh blood is human blood. I have examined the blood of quite a number of patients under various diseases to find out the effect of the disease upon the diameter of the blood corpuscles. The disease may have the effect to enlarge the corpuscles, that is, to make their average considerably larger than that which is assumed to be the average size of the human corpuscles, or it may have the effect to diminish the size of them.

*Professor Harold Moyer*, of Rush Medical College, testified: "The effect of disease in a human being is to vary greatly the size of the corpuscles, making them either larger or smaller. A child's corpuscles are larger as a rule than are adults. In the present state of science it is impossible to determine with certainty, even under the most favorable circumstances, that any given specimen of fresh blood is human blood." "There are a number of animals whose corpuscles approximate in size

the corpuscles in human blood; their structure is identical. There are two or three animals whose corpuscles are larger than those in man—the two-toed sloth, the whale or the elephant. The closest approximation is found in the blood of a dog, the guinea pig rather closely, and the rabbit not so closely. There are others, I think, but I cannot mention them now; the average number of corpuscles to the inch in a rabbit is, I think, 3800. In the human blood I do not think there is any absolute average; there is an average recognized of 3200 or 3250 to the inch. The corpuscles of a puppy are larger than the human corpuscles. It is impossible to distinguish in an adult dog the blood corpuscles from those of a human being.”

*Lester Curtis, M. D.*, testified: “In the present state of science it is possible to determine accurately by the measurement of blood corpuscles from a specimen of dried blood nothing further than the mere fact that it is the blood of some mammal. There are two main methods of determining whether any fluid is blood or not; one is by chemical examination and the other is by the microscope; chemically the human blood corresponds exactly, I believe, with that of all mammals—all animals that suckle their young; also animals like frogs and fish. The chemical composition is slightly different in frogs and fish. But all mammals have blood as far as known of identical chemical composition; that leaves only the examination with the microscope to identify them, and the corpuscles are so nearly alike in different mammals that it is very difficult, if not impossible, to distinguish between them. The corpuscles vary in size somewhat in different mammals within natural limits. I believe some observers claim that they can identify the blood of a sheep, possibly that of an ox; distinguish it at least from the human blood by examination of a microscope and by measuring the corpuscles, but the best and most conservative of observers are inclined to doubt that very seriously. There are a good many animals which it is certainly impossible to distinguish between. From my own observation and experience I would not dare to say when blood is dried, whether it was the blood of an ox, a sheep, a horse or a man.” He also testified that disease might change the diameter of blood corpuscles.

Those who are interested in the question of the identification of human blood, are referred to two articles written by Professor Marshall D. Ewell, LL. D., and published in the *North American Practitioner* (Chicago), in the March and April numbers for 1890. These articles will be found valuable as the latest contribution to the literature of this subject.



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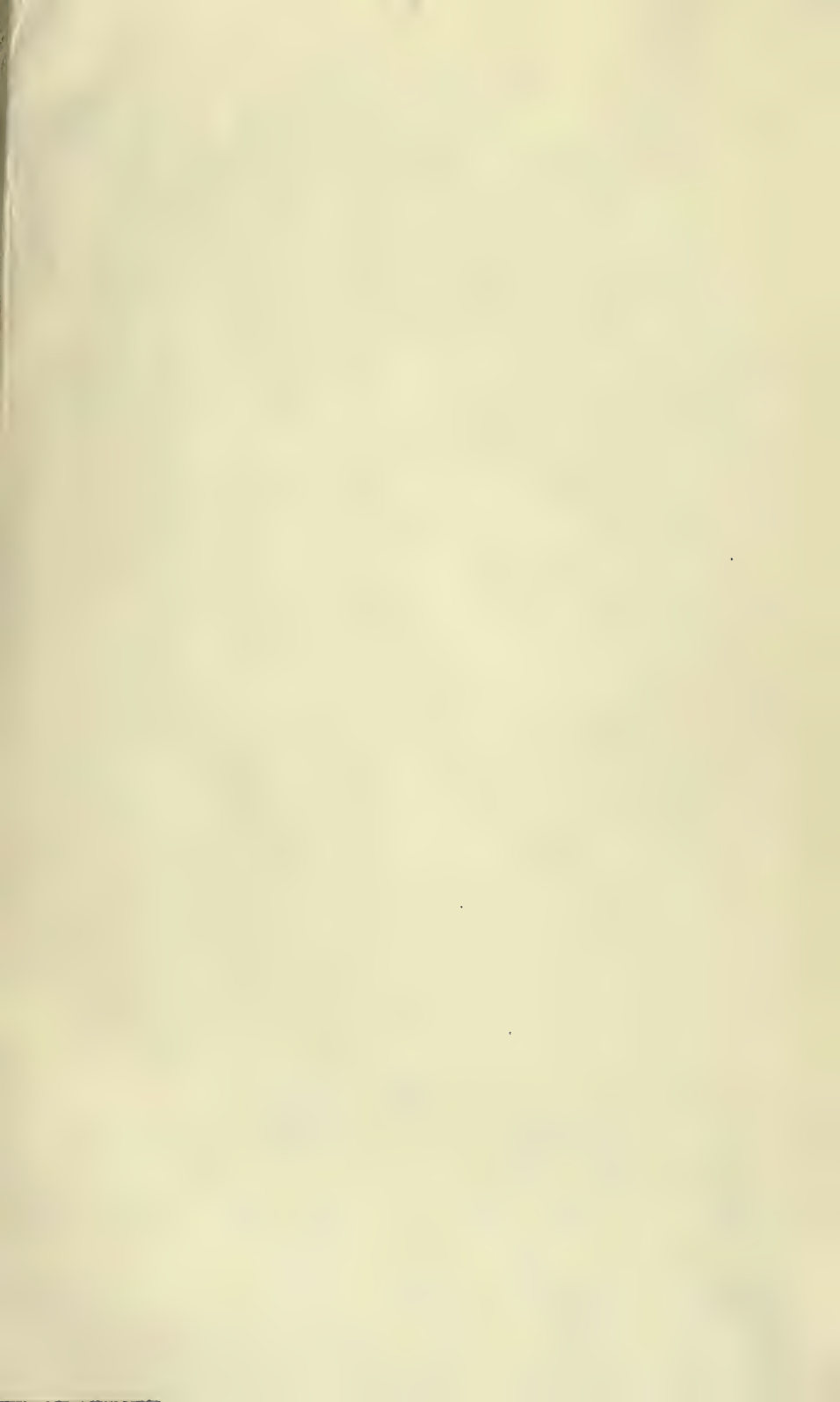
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